88-1570
No. _____

Supreme Court, U.S.
FILED
FEB 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

CLYDE O. WASHINGTON and AVA B. WASHINGTON,

Petitioners,

vs.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LAPORTE COUNTY, INDIANA, ET AL.,

and

MARSHALL FIELD & COMPANY OF CHICAGO, ILLINOIS, ET AL.,

and

THE LAPORTE SUPERIOR COURT NUMBER ONE, MICHIGAN CITY, INDIANA, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CLYDE O. WASHINGTON
AVA B. WASHINGTON
203 Westwind Drive
P.O. Box 8834
Michigan City, Indiana 46360
(219) 872-6836

Petitioners Pro Se

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342 2831

QUESTIONS PRESENTED

I. Whether Rule 47 as set forth in The Federal Rules of Appellate Procedure can be abrogated without an act by The United States Supreme Court or The United States Congress?

II. Whether Rule 34 as set forth in The Federal Rules of Appellate Procedure supercedes local Circuit Rule 34(a) as promulgated by the panel of (3) Three judges United States Appellate Court, Seventh Circuit. *Record*: 87-2787. Brief and Argument. Appendices Exhibits 1 Through 9, Filed on December 15, 1987. *Record*: 87-2787. Brief and Argument. (Re-Open.), Jurisdiction: Pages 8 Through 24, Filed on February 29, 1988.; *Record*: 87-2787. Oral Argument Requested. Table of Contents, Pages 1 Through 12. Filed on March 24, 1988?

III. Whether a party's right of due process under The 14th Amendment [1868] of The United States Constitution, can be abrogated by the Federal Appellate Court, Seventh Circuit, by that court modifying creating local Circuit Rule 34.(f) Local Rule, which is inconsistent and contrary to Rule 34 and Rule 47 of the Federal Rules of Appellate Procedure?

IV. Whether a party's right of due process under the 14th Amendment [1868] of The United States Constitution, can be abrogated by The Federal Appellate Court, Seventh Circuit, by that court Affirmance of The United States District Court, Order of October 6, 7, 1987. That all Defendants and Co-Defendants in Consolidated Civil Action Numbers § 83-0125 and § 87-00140, Pending Motions To Dismiss and Motions for Summary Judgment be GRANTED and Plaintiffs' Complaint be DISMISSED. Which is inconsistent and contrary to Rule 8(a)(1)(2)(3)(f), and 12(B) of The Federal Rules of Civil Procedure?

QUESTIONS PRESENTED (Cont.)

V. Whether The Petitioners Clyde O. Washington and Ava B. Washington, right of due process under The 7th Amendment [1791] of The United States Constitution, can be abrogated by The Federal Appellate Court, Seventh Circuit, ACCEPTED, APPROVED and AFFIRMED. The ORDER of The United States District Court, The courts Order of October 7, 1987, JUDGMENT IN A CIVIL CASE, CASE NUMBER § 83-00125, which is inconsistent and contrary to Rule 42(a), Rule 3(e), Rule 4.22, Section 1917 of United States Code Title 28 Rule 4.2d. Rule 4.2d(2). Joint and Consolidated Appeals. Of The Federal Rules of Civil Procedure?

VI. Whether 1. Title 42 U.S.C. 1983 *et seq.*; and 2. Title 18, Secs. 241 and 242 can be ABROGATED by the state court, the LaPorte Superior Court Number One, the Sheriffs Department of LaPorte County, Indiana, Kenneth E. Layton, and the Haviland – Callan Moving Company, and all personnel & employees thereof, Michigan City, Indiana. Title 42 U.S.C. Section 1983 reads: EVERY PERSON WHO, UNDER COLOR OF ANY STATUTE, ORDINANCE, REGULATION, CUSTOM OR USAGE, OF ANY STATE, subjects or causes to to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, SHALL BE LIABLE TO THE PARTY INJURED in a civil action at law, suit in equity, or other proper proceedings for redress by that court's argument "Judge Donald D. Martin, is immune under the doctrine of judicial immunity?" This Court has long recognized the "any state law, however clearly within a state's acknowledged power, which interferes with or is contrary to federal law, must yield." *Felder*, 108 S. Ct. at 2306, citing *Free v. Bland*, 369 U.S. 663, 666 (1962). On The LAPORTE SUPERIOR COURT

QUESTIONS PRESENTED (Cont.)

NUMBER ONE, Donald D. Martin, Judge.; The Sheriff's Department of LAPORTE COUNTY, INDIANA Kenneth E. Layton, The FIRST FEDERAL OF LAPORTE COUNTY, INDIANA its agents, Orville L. Anderson, Notice: PLEASE TAKE NOTICE that there is a Lawsuit filed in this matter, pending in the in The United States district court. Under, "Civil Action Numbers § 83-00125 and § 87-00140" which has not been brought to trial.

Plaintiffs in this case have demanded a trial by jury under The 7th AMENDMENT OF THE UNITED STATES CONSTITUTION [1791]. UNDER THE CONSTITUTION OF INDIANA, [1851.] ARTICLE 1. Sec. 11, 12, and 20. The case yet Pending in The United States District Court South Bend, Indiana for LaPorte County. Dated This 23 day of April 1987.

Clyde O. Washington and
Ava B. Washington.
/s/ Ava B. Washington.

The LAPORTE SUPERIOR COURT, Donald D. Martin, Judge Thereof.; The SHERIFFS department of LAPORTE COUNTY, INDIANA, Kenneth E. Layton.; The Haviland-Callan moving Company, personnel, its employees.; and The FIRST FEDERAL OF LAPORTE COUNTY, its agents, O.L. Anderson, David Jocelyn, and C.T. Kitowski. Did on The 29th day of April, 1987 obstructed justice in this pending case in the United States district court., and did knowing, willingly and maliciously violate Clyde O. Washington. and Ava B. Washington Constitutional Rights. *See* Record: 87-2787. Brief and Argument. pages 127 To End. Brief filed December 15, 1987?

QUESTIONS PRESENTED (Cont.)

VII. Whether ARTICLE IX. AUTHENTICATION AND IDENTIFICATION, RULE 901. REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION. (a) General Provision. As set forth in The Federal Rules of Evidence can be abrogated by The Federal Court of Appeals, Seventh Circuit, without an Act by The Supreme Court or The United States Congress?

VIII. Whether Rule 902. SELF-AUTHENTICATION (1) Domestic Public Documents Under Seal. (Petitioner's Promissory Note, Federal Reserve Regulation Z.; First Federals Loan NUMBER L-176-22 To Clyde O. and Ava B. Washington. Mortgage dated October 30, 1981). Federal Rules of Evidence. Rule 902(2) Domestic Public Documents Not Under Seal. (First Federal Documents of Mortgage, Loan Settlement Statement, Signed by its agent, H. James Pugh, dated October 30, 1981, First Federal Residential Loan Application Appraisal., of Petitioner's, Schedule of Real Estate Owned, Present Market Value ($77,000.00) Signed by its agent, John P. Ramson, dated February 23, 1981.) As set forth in The Federal Rules of Evidence Supercedes Local Circuit RULE 34(f) as PROMULGATED BY THE UNITED STATES APPELLATE COURT, SEVENTH CIRCUIT?

IX. WHETHER RULE 42 AS SET FORTH IN THE FEDERAL RULES OF CIVIL PROCEDURE RULE 42(a) 28 U.S.C.A. SUPERCEDES 4.2D Related Appeals AS PROMULGATED BY THE UNITED STATES APPELLATE COURT SEVENTH CIRCUIT.

PARTIES TO THE PROCEEDINGS

The Named Petitioners are Clyde O. Washington and Ava B. Washington, Plaintiffs' in The United States District Court Northern District of Indiana South Bend Division, In Consolidated Civil Action Numbers § 87-00140 and § 83-00125: SO ORDERED. Dated This 5th day of August, 1987.

/s/ Allen Sharp,
CHIEF JUDGE, UNITED
STATES DISTRICT COURT.

CC: Washington, Price, Grimes, Livarchik, Baldwin, Ribnick, AUSA, 1st Fed Lpt, Anderson, Pugh, Bicek, Cred. Bur. J.Wm. Lee, FW CK. *See* DOCKET PROCEEDINGS NO. § *83-0125* page 4. Date 8/5/87, 71(a)., *See* CIVIL DOCKET CONTINUATION SHEET, DOCKET NO. § *87-00140* page 3. Date 8/5/87, NUMBER 51, ORDER: CAUSE NOS. § 87-140 and § 83-125 are CONSOLIDATED.

The Petitioners brought this action against respondents, filed on March 24, 1983 and March 9, 1987 in Indiana Federal Court arose from the identical set of circumstances as the complaint now before this court.

Respondents, First Federal Savings & Loan Association of LaPorte County, Indiana., Orville L. Anderson, H. James Pugh, Rita M. Bicek, Marshall Field & Company, Chicago, Illinois, Eldon Krausch, Libertyville, Illinois., Thomas Naughton, Chicago, Illinois., Credit Bureau Services, Inc., Michigan City, Indiana., Richard P. Schaumann, Michigan city, Indiana., John F. Hoehner, AUSA, Hammond, Indiana., Donald D. Martin, Judge, LAPORTE SUPERIOR COURT NUMBER ONE, Michigan City, Indiana., B.W. Donho, of Marshall Field & Company., Douglas M. Grimes, P.C., Gary, Indiana., Bethlehem Employees Federal Credit Union, its Agent, Joseph Vass, Federal Home Loan Bank Board, its Agent Francis Passarelli, Washington, D.C.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS v

TABLE OF AUTHORITIES ix

OPINIONS BELOW 2

JURISDICTION 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 5

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE WRIT 12

I.

RULE 47 AS SET FORTH IN THE FEDERAL RULES OF APPELLATE PROCEDURE CANNOT BE ABROGATED WITHOUT AN ACT BY THE UNITED STATES SUPREME COURT OR THE UNITED STATES CONGRESS A-33

TABLE OF CONTENTS–Continued

Page

II.

RULE 3 AS SET FORTH IN THE FEDERAL RULES OF APPELLATE PROCEDURE CANNOT BE ABROGATED WITHOUT AN ACT BY THE UNITED STATES SUPREME COURT OR THE UNITED STATES CONGRESS. THE PETITIONERS ON NOVEMBER 2, 4, 1987. PAID MULTIPLE FILING FEES TO THE UNITED STATES APPELLATE COURT, SEVENTH CIRCUIT. IN THE PETITIONERS, NOTICE OF APPEAL IN CAUSE NUMBERS § 83-00125 and § 87-00140..... A-23,25

III.

FEDERAL RULES OF CIVIL PROCEDURE 28 U.S.C.A. RULE THUS: RULE 42:(a) CONSOLIDATION; (b): THIRD-PARTY CLAIMS, OR ISSUES, ALWAYS PRESERVING INVIOLATE THE RIGHT OF TRIAL BY JURY AS DECLARED BY THE SEVENTH AMENDMENT TO THE CONSTITUTION OR AS GIVEN BY A STATUTE OF THE UNITED STATES. AS AMENDED FEBRUARY 28, 1966, EFFECTIVE JULY 1, 1966. CANNOT BE ABROGATED BY THE FEDERAL APPELLATE COURT, SEVENTH CIRCUIT.. 24

TABLE OF CONTENTS–Continued

Page

IV.

FEDERAL RULES OF CIVIL PROCEDURE RULES 8(a), 12(b), AND 8(f), 28 U.S.C.A. RULE THUS: THE FACT THAT A COMPLAINT IS HARD TO UNDERSTAND, WITH NOTHING MORE, SHOULD NOT BRING ABOUT ITS DISMISSAL IN VIEW OF THE FEDERAL RULE REQUIRING THAT ALL PLEADINGS SHALL BE SO CONSTRUED AS TO DO SUBSTANTIAL JUSTICE. A PARTY'S RIGHT OF DUE PROCESS UNDER THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION. A PARTY'S RIGHT OF DUE PROCESS UNDER ARTICLE 1. BILL OF RIGHTS SECTION 11, 12, 20, 22, 23, AND 26, OF THE CONSTITUTION OF INDIANA, 1851, CANNOT BE ABROGATED BY THE FEDERAL APPELLATE COURT, SEVENTH CIRCUIT..... 29, 15, 16

V.

RULE 34 AS SET FORTH IN THE FEDERAL RULES OF APPELLATE PROCEDURE SUPERCEDES LOCAL CIRCUIT RULE 34(F) AS SUGGESTED BY RESPONDENT JOHN F. HOEHNER, ASSISTANT UNITED STATES ATTORNEY, HAMMOND, INDIANA. AS PROMULGATED BY THE UNITED STATES APPELLATE COURT, SEVENTH CIRCUIT

CONCLUSION..... 30

TABLE OF AUTHORITIES

Page

Cases

28 U.S.C.A. ¶1481 A-1 24 HOURS TOWING INC. 33 B.R. 281 17

Anderson v. Watt, 138 U.S. 702 (1891) 14

Bramlett v. Peterson, 307 F. Supp. 1313 (1969) ... 17, 22

Brooks v. Pennsylvania R Co., 91 F. Supp. 101 29

Brown v. E.W. Bliss Co., (C.A.8. Mo. 1987), 818 F.2d 1405 30

Brown v. Western Railway of Alabama, 338 U.S. 294 (1949) 12

Burt v. City of New York, 156 F.2d 791 30

Caldwell v. State of Texas, Tex. 1891 S.Ct. 224, 137 U.S. 692 29

Conley v. Gibson, certiorari to the (5th Cir.) 355 U.S. 29

Erie Railroad Company v. Tompkins, 304 U.S. 64 (1983) 12

Felder v. Casey, 108 S.Ct. 2302 (1988) 12

Forrester v. White, 108 S. Ct. 538 (1988) 28

Free v. Bland, 369 U.S. 663 (1962) 12

Guaranty Trust Company v. York, 326 U.S. 99 (1945) 12

Haines v. Kerner, certiorari to the (7th Cir.) 404 U.S. 29

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 28

Imbler v. Pachtman, 424 U.S. 409 (1976) 28

TABLE OF AUTHORITIES–Continued

Page

McNello v. John B. Kelly, Inc., 283 F.2d 96 (3rd Cir.1969) 14

Mullen v. Torrance, 22 U.S. (9 Wheat.) 536, 6 L.Ed. 154 (1854) 14

Nanez v. Ritger, 304 F.Supp. 355 (1969) 29

Owens v. Battenfield, C.C.A. Okla. 1929, 33 F.2d 753 certiorari denied 50 S.Ct. 88, 280 U.S. 605 30

Pierson v. Ray, 386 U.S. 547 Certiorari to the Federal Court of Appeals, Third Circuit, (1967) ... 17, 22

Randall v. Brigham, 74 U.S. 523, 19 L.Ed. 285.; 9 S. Ct. Digest 746 17

Rhodes v. Jones, 351 F.2d 884 (8th Cir. 1965), cert. denied, 383 U.S. 916 (1966) 14

Smith v. Sperling, 354 U.S. 91, 77 S.Ct. 1112, 1 L.Ed.2d 1205 (1957) 14

Swiam v. Smith, 130 S.W.2d 116 (1939) 20

Tenney v. Brandhove, 341 U.S. 367 17

United Mine Workers v. Gibbs, 382 U.S. 809 13

Walker v. Sauvinet, La. 1875, 92 U.S. 90 30

Wilson v. Standefer, Tex. 1902, 22 S. Ct. 384, 184 U.S. 399 30

Yates v. Hoffman Estates, (1962, DCIL) 209 F.Supp. 757 17

TABLE OF AUTHORITIES–Continued

Page

OTHER AUTHORITIES

Article 1. Indiana Constitution Section 11, 12, 20, 22, 23, 26 ..... 6, 15, 16

Black's Law Dictionary p. 377 28

Federal Rules of Appellate Procedure 3(b)(e) 2

Federal Rules Appellate Procedure 34(a) 5, 30

Federal Rules of Civil Procedure 8(a)(f) 12(b) 5

Federal Rules Civil Procedure Rule 42(a) 5, 24

Federal Rules of Civil Procedure, Rule 901., Rule 902 5

Federal Rules of Evidence 5

Merriam-Webster Dictionary p. 333 28

Rules of Federal Appellate Procedure, Rule 47 5

Truth-in-Lending Federal Act 15 U.S.C. 1601 *et seq.* .. 5, 7

United States Constitution 14th Amendment 5, 28

United States Constitution 7th Amendment 5, 28

42 U.S.C. §1983 of the Civil Rights Act 5, 29

No. _____

In The

Supreme Court of the United States

October Term, 1988

CLYDE O. WASHINGTON and AVA B. WASHINGTON,

Petitioners,

vs.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LAPORTE COUNTY, INDIANA, ET AL.,

and

MARSHALL FIELD & COMPANY OF CHICAGO, ILLINOIS, ET AL.,

and

THE LAPORTE SUPERIOR COURT NUMBER ONE, MICHIGAN CITY, INDIANA, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS, CLYDE O. WASHINGTON and AVA B. WASHINGTON, respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit in this case on February 23, 1988 and April 1, 1988 and May 15, 1988 and May 19, 1988 and November 22, 1988.

OPINIONS BELOW

The orders denying the petition for consolidation in cause numbers S 87-00140 and S 83-00125 in the United States Court of Appeals for the Seventh Circuit in which (cause numbers S 87-00140 and S 83-00125) was consolidated in the United States District Court for the Northern District of Indiana South Bend Division entered, August 5, 1987 (Appendix G), and in which the Petitioners on November 2, 1987 and November 4, 1987 paid multiple filing fees therein (Appendix I) respectively. The opinion of the United States Court of Appeals, Seventh Circuit, as set forth in the February 23, 1988, order of said court, Hon. Joel M. Flaum, Hon. Frank H. Easterbrook, Hon. Kenneth F. Ripple voting; That Judge Sharp (Chief Judge, United States District Court for the Northern District of Indiana) was without authority to consolidate the cases (Appendix K). Further opinion of the United States Court of Appeals, for the Seventh Circuit as set forth in the April 1, 1988, order of said court, Hon. Richard D. Cudahy; It Is Ordered that the motion to consolidate is Denied. Only appeals may be consolidated. See Fed. R. App. P. 3(b). District Court Case No. S 87-140 remains pending in the District Court.

Petitioners Record 87-2787. Oral Argument Request Page 1. Filed March 24, 1988. Appendix M.

And further. The opinion of the United States Court of Appeals, Seventh Circuit, as set forth in the April 22, 1988, order of said court, Hon. Joel M. Flaum, this Court does not have jurisdiction to consolidate cases in the district court. Further still; The opinion of the United States Court of Appeals, Seventh Circuit, as set forth in the May 19, 1988, order of said Court was Unanimous;

Hon. Harlington Wood, Jr., Hon. Frank H. Easterbrook, Hon. Daniel A. Manion. Petitioners' "Petition For Writ Of Mandamus" filed herein of said court, May 6, 1988. Respondent Hon. Joel M. Flaum, Hon. William C. Lee. Order of said court response to petitioners. It Is Ordered (consolidation of cause numbers S 87-00140 and S 83-00125, was/is referred to Gene B. Lee, U.S. Magistrate, on May 7, 1984 and August 11, 1987. Honorable Gene B. Lee issued his Report to the U.S. District Court, dated August 14, 1987. Page 1. Paragraph 2 of his Report and Recommendation, states: Clyde and Ava Washington *originally* filed this (same transaction) lawsuit in the South Bend Division on March 24, 1983.) That said motion is Denied. (Appendix O)

JURISDICTIONAL STATEMENT

The basis for jurisdiction in the United States District Court. The Petitioners and Respondent First Federal S&L. Association of LaPorte County, Indiana, its agents, Mr. O. L. Anderson, president, Mr. H. James Pugh, vice president, Mr. Rita M. Bicek, preparer of Mortgage Instrument No. 81-09456, under the direction of Mr. H. James Pugh. The Residential Loan Application (Equity Loan) date the 23rd of February, 1981. Loan Amount ($32,000.00). First Federal S&L. of LaPorte County, Indiana, Approved Loan Application Amount Term; 20 years at 14%. First Federal Commitment Letter to Petitioners, to lend the petitioners ($32,000.00) Letter dated March 13, 1981. First Federal Appraisal (First Federals agent) of Real Estate Owned by Clyde O. and Ava B. Washington, Present (February 23, 1981) Market Value, seventy seven thousand ($77,000.00) dollars. First Federal its agents, Mr. H. James Pugh, Ms.

Rita M. Bicek did represent unto the petitioner, on the 30th day of October, 1981, that Respondent First Federal would lend to the petitioners thirty two thousand six hundred ($32,600.00) dollars; minus ten thousand two hundred nineteen ($10,219.84) dollars eighty four cents. In reliance upon the representations by the representative of First Federal, Mr. H. James Pugh, the petitioners did execute and deliver unto the First Federal S&L. a certain Promissory Note in the amount of thirty two thousand six hundred ($32,600.00) dollars. In reliance upon the representation by the representative of First Federal, Mr. H. James Pugh, the petitioners did execute and *deliver* unto the First Federal S&L. a certain Federal Reserve Regulations Z Real Property Transaction Document in the Amount Of The Loan in this transaction, thirty two thousand six hundred ($32,600.00) dollars the Petitioner and Respondents First Federal S&L having in controversy a matter in excess of $30,000.00 as of February 23, 1981, March 13, 16, 1981 and October 30, 1981.

The basis for jurisdiction in the United States District Court between Petitioners and Respondent John F. Hoehner, AUSA while in private practice at law. The Respondent promised to represent the Petitioner, in the LaPorte County Court-MC. Cause Number LPC-MC-80-2P-340, at Michigan City, Indiana. Respondent required of Petitioners, that Respondent retainer of $350.00 be paid in advance of December 30, 1981, of Petitioners Court Appearance date. Petitioners paid to Respondent personally his retainer of $350.00 in full on December 24, 1981. Respondent did not represent the Petitioners in the LaPorte County Court-MC. The Petitioners and Respondent having in controversy a matter in excess of $350.00.

ALLEGATION OF JURISDICTION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Jurisdiction founded on the existence of a Federal question an amount in controversy exceeding $50,000.00.

The action in the court below, as before this court arises under the Constitution of the United States, Art. VII, Section VII; the 7th Amendment to the Constitution of the United States; Article *VII*, Section *XIV*; the 14th Amendment [1868] to the Constitution of the United States.

28 U.S.C.A. §42., 28 U.S.C. §2071., 28 U.S.C.A. §8(a), (f)., 28 U.S.C.A. §12(b)., Federal Rules of Evidence Article IX. Rule 901. Rule 902.

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court, Rules of Civil Procedure, Rule 42.(a)(b), Rules of Federal Appellate Procedure. Rule 3.(a)(b), Local Rules involved: Federal Court of Appeals, Seventh Circuit, Rule 3.(a)(b). Rule 4(a)(1), Rules of Federal Appellate Procedure, Rule 47, Rules of Federal Appellate Procedure, Rule 8.(a)(f), and Rule 12.(b), Federal Rules for Civil Procedure, Rule 901., Rule 902., Federal Rules of Evidence Article IX, Rule 34.(a), Rules of Federal Appellate Procedure, Local Rules involved: Federal Court of Appeals, Seventh Circuit, Rule 34.(f). Federal Civil Rights under 42 U.S.C. §1983 of the Civil Rights Act. Truth-in-Lending Federal Act 15 U.S.C. 1601 *et seq.*

The Constitution of Indiana, 1851 ARTICLE 1.; Bill of Rights Sections 11, 12, 20, 23, and 26.; 5.; 35-44-42-1.; Perjury. – (a).; 35-44-2-2. False informing – (a). CHAPTER 6. RACKETEER INFLUENCED – 35-45-6-1. Definitions. – As used in this chapter.; 35-45-6-2. Corrup business influence – Penalty. – (a). CHAPTER 7. LOANSHARKING 35-45-7-1. Definitions. – As used in this chapter.; 35-45-7-2. Loansharking a felony.; 35-45-7-3. Applicability to chapter.

The LaPorte Superior Court Number One the Honorable Donald D. Martin, thereof said Court on the 7th day of July 1986 awarded the First Federal Savings and Loan Association of LaPorte County, Indiana thirty five hundred forty three ($3,543,12) dollars and twelve cents Saving Account. Account Number 1-421297-01 a Savings Deposit in First Federal Savings and Loan Association of LaPorte County, Indiana. Insured Savings by the Federal Savings & Loan Insurance Corporation, member of the Federal Home Loan Bank System.

STATEMENT OF THE CASE

The Prior Federal and State Court Actions Concerning The Same Transaction

This case was brought (originally) by the mortgagors for the purpose of, RESCISSION of, Clyde O. Washington and Ava B. Washington Real Estate (Equity Loan) Mortgage to FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LAPORTE COUNTY, MICHIGAN CITY, INDIANA. Mortgage Dated October 30, 1981, recorded

November 4, 1981 as Instrument No. 81-09456, in the Office of the Recorder of LaPorte County, Indiana. Involving §4.13. Truth-in-Lending. Truth-in-Lending Act 12 U.S.C. §1601 et seq., 12 C.F.R. §226.8(b)(a)., 12 C.F.R. §226.8(d)(1)., 12 C.F.R. §226.8(d)(3)., 12 C.F.R. §226.8(e)(2)(i)., BURNS INDIANA CODES STATUTES: 35-44-2-1. Perjury (1)(2)(b)(1)., 35-44-2-2. False informing. – (a)(b)(1)., CHAPTER 6 RACKETEER INFLUENCED 35-45-6-1. Definitions. – As used in the chapter: "Documentary Material" means any document, drawing, photograph, recording, or other tangible item containing compiled data from which information can be translated into a usable form. "Enterprise" means a: (1) Sole proprietorship, corporation, partnership, business trust, or governmental entity; CHAPTER 7. LOANSHARKING. 35-45-7-1. Definitions. – as used in this chapter: "Loan" means any transaction described in section 3 [35-45-7-3].

STATEMENT

That on October 30, 1981 First Federal its agent, Mr. H. James Pugh did represent unto the Washington's that First Federal had changed the amount of $32,000. Dollars. to the amount of $32,600. Dollars, loan to Clyde O. and Ava B. Washington.

In reliance upon the representations by the representative of First Federal, Mr. H. James Pugh, Clyde O. Washington and Ava B. Washington did execute and deliver unto the First Federal of LaPorte County, a certain promissory note in the amount of thirty two thousand six hundred ($32,600.) dollars which states: For Value

Received. That Clyde O. Washington and Ava B. Washington, husband and wife, of LaPorte County, in the State of Indiana Mortgage and Warrant to First Federal Savings and Loan Association of LaPorte County, of LaPorte County, in the State of Indiana, the following described Real Estate in LaPorte County, in the State of Indiana, as follows, To-Wit:

> Lot 20 in Block 4 in Southgate First Addition To Michigan City, which is recorded in Plat Book 11 page 49, in the Office of the Recorder of LaPorte County, Indiana.

Promissory Note and Mortgage dated October 30, 1981. *See* Appendix T-1-b. (Record S 83-00125. at 29)., (Record 87-2787. O.A. R. at 36.)

The First Federal S&L. of LaPorte County, by and through its agent(s), Mr. H. James Pugh Knew, That The amount actually loaned To Clyde O. and Ava B. Washington, on October 30, 1981, was not, thirty two thousand six hundred ($32,600.) dollars but in fact (the amount risked) was not greater than, (a) sixty "60%" percent of the Appraised Current Market Value, of Clyde O. and Ava B. Washington Real Estate. The real estate was appraised by First Federal agent Mr. John P. Ramson. (Appendix T-1-b.) SCHEDULE OF REAL ESTATE OWNED, Current Market Value is seventy seven thousand ($77,000.) dollars., Signed John P. Ramson, Interviewer. (B) Amount of Mortgages & Liens $28,863.56 Date February 23, 1981.) (C) On October 30, 1981, Total deductions by First Federal, its Loan Officer Mr. H. James Pugh, Vice President for loan expenses $1,192.72.), (d) Loan disbursements made or to be made by the association on your order: Total $9,027.12.) (e) Amount to be paid by the association as

for, (For Value Received $23,490.16) at the rate of fourteen (14.0) percent per annum, principal and interest.

By the research and study performed by the Washingtons ("Ava B. Washington".) Study. Source: The Complete Payment Book page 47. Contemporary Books, Inc. Chicago, Illinois., McGraw-Hill Paperbacks Interest Amortization Tables page 75. McGraw-Hill Book Company.) The amount to be amortized over a period of twenty (20) years. Was not $32,600.00) dollars, but IN FACT was $23,490.16. Signed Loan Settlement Statement, October 30, 1981, by H. James Pugh, Vice President. ("Borrower") Clyde O. Washington, ("Borrower") Ava B. Washington. LOAN SETTLEMENT STATEMENT.

That First Federal of LaPorte County, its agent Mr. H. James Pugh did represent unto Clyde O. Washington and Ava B. Washington, on October 30, 1981 Document: NOTICE TO CUSTOMERS REQUIRED BY FEDERAL LAW FEDERAL RESERVE REGULATION Z., (a) The FINANCE CHARGE on this transaction will begin to accrue on October 30, 1981 LOAN No. L-176-22, The AMOUNT OF THE LOAN in this transaction is $32,600.00, Less the PREPAID FINANCE CHARGE on this transaction which includes: Interest, Service Charge, Mortgage Insurance Premium, TOTAL PREPAID FINANCE CHARGES $899.40 Equals the AMOUNT FINANCED in this transaction $31,700.60., NET PROCEEDS WAS NOT $31,700.60). NOTICE TO CUSTOMERS REQUIRED BY FEDERAL LAW FEDERAL RESERVE REGULATION Z.

Further Clyde O. and Ava B. Washington, First Mortgage, recorded as Instrument No. 77-00774 on January 26, 1977, in the Office of the Recorder of LaPorte County,

Indiana, on said real estate held by First Federal of LaPorte County, Indiana, Monthly Installments paid to the First Federal by the Washingtons of $329.00), dollars, provides for: Principle, and Interest, Taxes and Insurance on the property commonly known, 342 Crestwood Drive, Michigan City, LaPorte County, Indiana.

In the LaPorte County Court-MC

This case was brought by Clyde O. Washington and Ava B. Washington to contest the lawsuit brought against the Washington's by Marshall Field & Company of Chicago, Illinois, through its agents, lawsuit filed in the LaPorte County Court, Michigan City, Indiana on February 5, 1980. That the amount of money claimed is incorrect.; That the signature, Clyde O. Washington upon the Marshall Field & Company – Home Plan Agreement, executed at Chicago, Illinois, October 21, 1974 is fraudulent. That Marshall Field & Company, by and through its agent(s), placed a copy of the fraudulent document in a sealed envelope with prepaid postage, in the United States Mail on November 1, 1974, addressed to Clyde O. Washington.

That Marshall Field & Company by and through its agents, did place a written lien against Clyde O. and Ava B. Washington, Homestead, February 5, 1980. That Marshall Field & Company by and through its agents, Mr. Eldon Krausch, Creditors Bureau Services., in the LaPorte County Court, on June 12, 1980, having been duly sworn by the Court then testified upon his oath, That Clyde O. Washington and Ava B. Washington OWED., Marshall Field & Company of Chicago, Illinois, $2,815.14 plus $32.00 court cost. (Record S83-00125 at P.1 of pages).,

(Record 87-2787. P.2, 3 of pages 13. Oral Argument Request. Filed in the United States Court of Appeals, Seventh Circuit).,

STATUTES INVOLVED: MARSHALL FIELD AND COMPANY – HOME PLAN AGREEMENT DATED OCTOBER 21, 1974, ILL.Rev.Stat. 1985, ch. §17-3. Forgery., BURNS INDIANA STATUTES §35-44-2-1., §1507. §1.11-12. DATED FEB. 5, 1980; JUNE 12, 1980., ILL STAT.Ch. §32-2. §35-45-7-2, as added by Acts 1980, P.L.207, §1] §35-45-6-12.(1)(2)., §35-45-6-2.(2)(3).

DEC.23, 1981:

That on, December 23, 1981, Clyde O. and Ava B. Washington, consulted John F. Hoehner, Assistant United States Attorney for the Northern District of Indiana, Hammond, Indiana. Mr. Hoehner while he was in private practice to represent the Washington's in the pending case, Marshall Field & Company vs. Clyde O. and Ava B. Washington, was yet pending in the LaPorte County Court 1981-1982 Term. Clyde O. and Ava B. Washington, ("Ava B. Washington") consulted Mr. Hoehner in this pending matter. John F. Hoehner, Attorney at law, promised orally, for payment in the amount of three hundred fifty dollars ($350.00) paid in advance, he (Mr. Hoehner) would take this pending litigation over. ("Represent") the Washington's who as before had been pro se; in this matter. John F. Hoehner, Attorney at law, *DID NOT* APPEAR, in the LaPorte County Court to represent Clyde O. and Ava B. Washington, in their scheduled appearance on December 30, 1981 and August 11, 1982. Controversy the payment of ($350.00) on December 23, 24, 1981. (At Record 83-125 p.l. Section 2.P. 74. Section 3)., See Record 87-2787. P. 10, O.A.R., filed in the UNITED STATES

COURT of Appeals For the Seventh Circuit., March 24, 1988).

REASONS FOR GRANTING THE WRIT

The United States Constitution is clear. A separation of powers is one of the primary concepts upon which the United States Constitution was predicated and enacted. The designers and writers of the United States Constitution were most careful to specifically outline the rights and duties of the Executive, Legislative, and Judicial Branches of government and embodied these delineations in Article 1 of the United States Constitution.

In the LaPorte Superior Court Number 1

Just as federal courts are required to apply state law to state claims, (*Erie Railroad Company v. Tompkins*, 304 U.S. 64 [1983]), the Supremacy Clause of the United States Constitution imposes on state courts a constitutional duty to protect substantial rights of the parties under controlling federal law. *Guaranty Trust Company v. York*, 326 U.S. 99, 109 (1945). Although the states are generally permitted to establish their own rules of civil procedure, state courts entertaining federal actions are preempted from using these local forms of practice to thwart a federal right. *Felder v. Casey*, 108 S. Ct. 2302, 2306 (1988), citing *Brown v. Western Railway of Alabama*, 338 U.S. 294, 296 (1949). This Court has long recognized that "any state law, however clearly within a state's acknowledge power, which interferes with or is contrary to federal law, must yield." *Felder*, 108 S. Ct. at 2306, citing *Free v. Bland*, 369 U.S. 663, 666 (1962).

The Prior Federal Court Actions Filed By The Petitioners On March 24, 1983 Concerning The Same Transaction Was Yet Pending.

The LaPorte Superior Court Number One, Donald D. Martin, regular Judge thereof order.; in CAUSE NUMBER 44576 in said court to the Sheriff Department of LaPorte County, Indiana Kenneth E. Layton,: WHEREAS, the defendants and others are still in possession of said real estate and refuse to surrender same to plaintiff.; YOU ARE THEREFORE HEREBY COMMANDED to enter upon and deliver possession of said real estate to First Federal Savings and Loan Association of LaPorte County the plaintiff herein.

YOU ARE FURTHER ORDERED to make do return of this writ within ten (10) days from the date hereof.

DATED this *11th* day of February, 1987. /s/ Donald D. Martin, Judge.

LaPorte Superior Court No. 1

[Handwritten note at bottom In Red Ink: If you are not out within 30 days of service we will have to move you.; The Sheriffs department will be at your home on the 29th day of April 1987, to supervise your eviction at 8:00 *AM.*]

I HEREBY CERTIFY THE WITHIN TO BE A TRUE COPY OF THE ORIGINAL WRIT. KENNETH E. LAYTON, SHERIFF, BY /S/ HELEN SOVANICK - Deputy.

The LaPorte Superior Courts have twisted, and abrogated beyond reason this Court's ruling in *United Mine Workers v. Gibbs*, 382 U.S. 89, in the pendant jurisdiction context,

is the very definition of "action." Similarly, in determining res judicata, a court looks to the nature of the "action" – the underlying facts – rather than a mere complaint. No authority exists for the proposition that "action" means one thing in *Gibbs* and another in FRCP 3. Further "commencement" means "begining", the time when the parties (May 22, 1981.; August 4, 1981.; October 8, 1981.; October 25, 1982.; March 24, 1983) are first adverse: "A cause of action is a situation or state of facts, which entitles a party to sustain an action and gives Plaintiffs the right to seek judicial interference in their behalf." *Rhodes v. Jones*, 351 F.2d 884 (8th Cir.1965), *cert. denied*, 383 U.S. 916 (1966). Thus to the common nucleus of operative fact – the action – and the time when the parties to that operative set of facts become adverse – commencement – there is no doubt that the action (Court-action) was commenced on March 24, 1983 in the United States District Court Northern District of Indiana South Bend Division.; Jurisdiction LaPorte County, Indiana.

It has long been settled that jurisdiction is tested by the facts as they existed at the time the action was commenced. *Smith v. Sperling*, 354 U.S. 91, 93 N.1, 77 S. Ct. 1112, 1113 N.1., 1 L.Ed.2d 1205 (1957); *Anderson v. Watt*, 138 U.S. 702-03 (1891); *McNello v. John B. Kelly, Inc.*, 283 F.2d 96, 99 N.1 (3rd Cir.1969). As Chief Justice Marshall declared in *Mullen v. Torrance*, 22 U.S. (9 Wheat.) 536, 6 L.Ed. 154 (1824) jurisdiction "depends upon the state of things at the time the *action* was brought."

The primary issue here cross-action filed in the LaPorte Superior Court Number One Donald D. Martin, Judge thereof of said Court ordered the Sheriffs Department of LaPorte County, Indiana Kenneth E. Layton to enter upon and deliver (to eject the Petitioners from their

Homestead while the prior and same transaction was yet pending before the Federal Court of the Northern District of Indiana) possession of said real estate to First Federal of LaPorte County, Indiana.

The United States Constitution is clear. 1. Title 42, U.S.C. §1983 et seq. Ch.21.; 2. Title 18, Sections 241 and 242.

Title 42, U.S.C. Section 1983 reads:

> Every person who, under color of any statute, ordinance, regulation, CUSTOM or usage, of any state, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. §1979; Pub. L. 96-170, §1, Dec. 29, 1979, 92 Stat. 1284.

Further.; The Constitution of Indiana, 1851 is clear. ARTICLE 1. Bill of Rights: Section 11 reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.
>
> Sec. 12. All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law.

Justice shall be administered freely, and without purchase; completely, and without denial; speedily and without delay.

Sec. 20. In all civil cases, the right of trial by jury shall remain inviolate.

* * *

Sec. 22. The privilege of the debtor to enjoy the necessary comforts of life, shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted; and there shall be no imprisonment for debt, except in case of fraud.

Sec. 23. The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which upon the same terms, shall not equally belong to all citizens.

* * *

Sec. 26. The operation of the laws shall never be suspended, except by the authority of the General Assembly.

The Constitution of the United States is the Supreme Law of the Land as stated in Article 6, paragraph 2, U.S. Constitution.

The Honorable Donald D. Martin, Judge who presided in this (Cross-Action) trial did take an Oath to uphold the Constitution of Indiana of which (The Petitioners believe) include, not exclude.; Article 1. Sections 11-12-20-22-23, and 26.

Judge Martin was well aware of the Petitioners allegations filed in the Indiana Federal Court, alleging Fraud, Breach of Contract, Truth-in-Lending Federal Act.; Forgery, and the no legal representation of the petitioners, Clyde and Ava Washington by John F. Hoehner, AUSA.;

retained by the Washingtons while Mr. Hoehner was in private practice.

The Honorable Judge Martin on January 6, 1986 had before him DOCUMENTS for Evidence. Judge Martin in this prior pending case lacked subject matter or personal jurisdiction, or when the judgment was founded on NO REAL DEBT or on a LEGALLY UNENFORCEABLE OBLIGATION. CITING 28 U.S.C.A. paragraph 1481. A-1 24 Hours Towing Inc., 33 B. R. 281.

The Supremacy Clause of the United States Constitution imposes on state courts a constitutional duty to protect substantial rights of the parties under controlling federal law "and the Judges in every state shall be bound thereby, any thing in the Constitution or Laws of any state to the contrary notwithstanding."

The Doctrine of Absolute Immunity, as applied to judges, exists only when the judge acts within his jurisdiction. This Court holdings in *Randall v. Brigham*, 74 U.S. 523, 19 L.Ed. 285.; 9 S. Ct. Digest 746. "When a judge exceeds his jurisdiction and grants or denies that beyond his lawful authority to grant or deny, he has perpetrated a 'nonjudicial' action." *Yates v. Hoffman Estates*, (1962, DCIL) 209 F. Supp. 757.; It is well-settled that judges may be enjoined from interfering with citizens rights. *Bramlett v. Peterson*, 307 F. Supp. 1313 (1969).; *Pierson v. Ray*, 386 U.S. 547, 548 Certiorari to the Federal Court of Appeals, Third Circuit, (1967).; Cf. *Tenney v. Brandhove*, 341 U.S. 367, P. 553-555. (Appendix 60)

The federal law which is threatened by the Appellate Court's holdings in this case, ORDER: February 23, 1988 Before Hon. JOEL M. FLAUM, Hon. FRANK H. EASTERBROOK, Hon. KENNETH F. RIPPLE. (Appendix K.;

ORDER: April 1, 1988 Before Hon. RICHARD D. CUDAHY. (Appendix M).; ORDER: May 15, 1987 Hon. WILLIAM J. BAUER, Hon. WALTER J. CUMMINGS, Hon. FRANK H. EASTERBROOK. (Appendix N).; ORDER: May 19, 1988 Hon. HARLINGTON WOOD, JR., Hon FRANK H. EASTERBROOK, Hon. DANIEL A. MANION. (Appendix O).; By the Court: March 10, 1988. (Appendix L). March 24, 1988 ORAL ARGUMENT REQUESTED STATEMENT: (Appendix O).; ORDER: November 22, 1988 Before Hon. WALTER J. CUMMINGS, Hon. KENNETH F. RIPPLE, Hon. DANIEL A. MANION JUDGMENT – WITHOUT ORAL ARGUMENT, Suggested by Respondent JOHN F. HOEHNER. (Appendix P). The Federal Court of Appeals, Seventh Circuit in its ORDERS. of ORDER of November 22, 1988 in paragraph (3) of that order, STATES:

> "As we noted in our orders of February 23, April 1, and April 22, 1988 this appeal is limited to those issues raised in and defendants named in the district court's case number 83 C 125, which were the subject of the magistrate's report and recommendation.

It is as clear as mountain water, beyond any, and all reasonable doubt. (Appendix F).; That on the 7th day of May, 1984 PM. Hon. WILLIAM C. LEE, ORDER: Referring Case Civil No. S 83-125, to United States Magistrate Gene B. Lee, Was. ENTER: May 7, 1984. It is also clear, very clear that the Plaintiffs' Amended Complaint filed on the 9th day of March, 1987 in Indiana Federal Court South Bend Division Civil No. S 87-140 arose from the identical

---

[1] Con-sol-i-date vb -dat-ed; refers 1: to join into one whole: UNITE Webster's Dictionary C a Merriam-Webster) p. 280.

set of (same transaction) circumstances as the complaint filed in Indiana Federal Court on the 24th day of March, 1983. (Appendix G – 8/5/87 – (SE) SHARP, J.).; Further, and on the 12th day of August, 1987 AM. Hon. WILLIAM C. LEE, ORDER: (Appendix H of ref./ to Mag. Gene B. Lee for hearing.), Enter: August 11, 1987.

ANSWER, TO THE FEDERAL COURT OF APPEALS, SEVENTH CIRCUIT AND THE COURT'S AFFIRMED JUDGMENT OF THE DISTRICT COURT, REASONS STATED IN MAGISTRATE'S THOUGHTFUL AND THOROUGH REPORT AND RECOMMENDATION IN THE UNITED STATES COURT OF APPEALS SEVENTH CIRCUIT.

To the Federal Court of Appeals, Seventh Circuit order of February 23, 1988. The consolidation of Cause Numbers S 87-140 and S83-125 pursuant to Rule 42(a) of the Federal Rules of civil Procedure, SO ORDERED. Dated this 5th day of August, 1987. /s/ ALLEN SHARP, J. Cannot be Abrogated Without An Act by The United States Supreme Court or The United States Congress. Fact, Case Number S 83-0125 was referred to Magistrate Gene B. Lee, May 7, 1984 /s/ William C. Lee, J.; Case Number S 87-140 was referred to Magistrate Gene B. Lee, August 11, 1987 /s/ William C. Lee, J. Fact paragraph 1. Report and Recommendation of May 7, 1987 is inconsistent and contrary of the True and Original Record in Cause Numbers S 83-00125 and S 87-00140.

To the Federal Court of Appeals, Seventh Circuit order of April 1, 1988. On August 14, 1987 the United States Magistrate Gene B. Lee, had before him Cause Numbers S 87-00140 and S 83-00125.; of which (the two

civil actions had been joined together to become one) had been ordered consolidated. The Record.; Civil Doçket Sheet consist of one hundred thirty nine (139) ORDER of ENTRIES, not a single entry-order affirms Hon. Richard D. Cudahy's *ORDER.*; IT IS ORDERED that the motion to consolidate is DENIED. Only appeals may be consolidated. *See* Fed. R. App. P. 3(b). District Court Case No. S 87-140 remains pending in the district court. Federal rules of Civil Procedure Rule 42(a), 28 U.S.C.A. Rule thus: When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all (Page 1. Paragraph 2. Report and Recommendation U.S. Magistrate Gene B. Lee) the matters in issue in the actions; it may order all the actions consolidated.; *Swiam v. Smith,* 130 S.W.2d 116, Page 119, [9] paragraph [4], Page 120 [10] (1939). The Federal Court of Appeals, Seventh circuit order of April 1, 1988 is inconsistent and contrary to Rule 3(a)(b)(e) of the Federal Rules of Appellate Procedure.

To the Federal Court of Appeals, Seventh Circuit order of February 23, 1988 Hon. Joel M. Flaum, on the 7th day of October , 1985 First Federal Savings and Loan of LaPorte County, Indiana, its agent, Orville L. Anderson, President through his attorney Casimer T. Kitowski, filed in the LaPorte Superior Court Number One Michigan City, Indiana. A Cross-Action to the (same transaction) Pending Action filed on March 24, 1983 in the United States District Court South Bend Division to foreclose the Washington's real estate mortgage executed to First Federal of LaPorte County, Indiana on October 30, 1981, recorded as Instrument No. 81-09456 in the Office of the Recorder of LaPorte County, Indiana. From the cross-action, and the action of the LaPorte Superior Court

Number One filed on October 7, 1985 is the same transaction pending in the Indiana Federal Court filed on March 24, 1983. Further, on the 18th day of October, 1985 Clyde and Ava Washington filed in the LaPorte Superior Court Number One their Motion to dismiss First Federal Cross-Action in Cause Number 44576, as substantially insufficient at law. that the real estate transaction is now pending in the United States District Court in its entirety. The LaPorte Superior court, the plaintiff First Federal failed to respond to the Washingtons' motion to dismiss. On April 29th, 1987 the LaPorte Superior Court Number One, Donald D. Martin, Judge thereof on Writ of Assistance to Kenneth E. Layton EVICTED Clyde O. and Ava B. Washington from their HOMESTEAD. While the prior civil action, Civil action Numbers S87-140 and S 83-125 was yet pending before the Indiana Federal Court.

The LaPorte Superior Court action, decision, Judgment and Decree of Foreclosure was inconsistent and contrary to law and trial (Indiana) Rule 56(D). The Washingtons' on the 8th of October, 1986 filed in the Indiana Federal Court.; Writ of Prohibition to issue to the LaPorte Superior Court One Donald D. Martin, Judge of said Court. A stay pending the outcome (same transaction) of trial in the Federal District Court. Further, and until the appeal process in this civil action has been exhausted. The United States District Court Fort Wayne Division Hon William C. Lee, Judge responded ORDER: The facts which underlie the original lawsuit and the basis of the plaintiffs' instant motion are completely unrelated. Procedurally, therefore, this motion does not belong in this suit. Therefore, for all of the foregoing reasons, plaintiffs' motion is DENIED. Enter: October 16, 1986. /s/ William C. Lee, Judge.

It is well established that judges may be enjoined from interfering with law abiding citizens, the citizens' rights. *Bramlett v. Peterson,* (1969, DC FL) 307 F. Supp. 1049; *Pierson v. Ray,* (1967) 386 U.S. 547.

In The Court Of Appeals Of Indiana Third District

On October 22, 1986 and November 10, 1986 Clyde O. and Ava B. Washington filed their motion. Under Trial Rule (Indiana) 60(A)(B)(3) Motions for Relief from Judgment. *ORDER:* (H.I.) And the Court, having examined said Motion for Relief From Judgment and being duly advised, now finds that the same should be ordered strickened from the records of this Court as an improper filing. ORDERED this 12th day of December, 1986. /s/ Paul H. Buchanan Jr., CHIEF JUDGE.

In the United States Court of Appeals Seventh Circuit

The Federal Court of Appeal Seventh Circuit, ORDER of April 22, 1988 Honorable Joel M. Flaum, Circuit Judge "This Court does not have jurisdiction to consolidate cases in the District Court. Accordingly, IT IS ORDERED that said motion is DENIED. The Federal Court of Appeals, Seventh Circuit, ORDER of February 23, 1988 Hon. Joel M. Flaum, Hon. Frank H. Easterbrook, Hon. Kenneth F. Ripple, This is an appeal from an order entered by Judge Lee in case number S 83-125 on October 6, 1987 granting defendants motions to dismiss. Case S83-125 was assigned to Judge Lee by Judge Sharp on December 8, 1983. Although Judge Sharp issued an order on August 5, 1987 consolidating this case with ("same transaction") a related Cause of Action, S 87-00140, and

assigning the latter case to Judge Lee, Judge Sharp was without authority to consolidate the cases because case S 83-125 was no longer assigned to him. Accordingly, we "not Judge Wm. C. Lee, (not United States Magistrate, We The Federal Court of Appeals, Seventh Circuit will abrogate Rule 42. (a) of the Federal rules of Civil Procedure.; Abrogate Rule 3.(a) (b), and (e) as set forth in the Federal Rules of Appellate Procedure)" deem Judge Sharp's order of August 5, 1987 to be a simple order of assignment, rather than one of consolidation. (Appendix G).

The Federal Court of Appeals, Seventh Circuit, May 19, Honorable Harlington Wood Jr., Honorable Frank H. Easterbrook, 1988 Before Honorable Harlington Wood Jr., Honorable Frank H. Easterbrook, Honorable Daniel A. Manion, Circuit Judge's *No. 88-1873* IN THE MATTER OF: CLYDE O. WASHINGTON and AVA B. WASHINGTON, Petitioners, vs. Judge Joel M. Flaum, Respondent and Judge William C. Lee, Respondent.; Petition for Writ of Mandamus Nos. 87 C140, 83 C 125, and Notice of Appeal filed in the Federal Court of Appeals, Seventh Circuit. (Appendix O). This matter comes before the court for its consideration of "PETITION FOR WRIT OF MANDAMUS" filed herein on May 6, 1988. Petitioners seek, by way of mandamus, to obtain review for the *third* time of their request that this court consolidate two district cases ("same transaction") which are currently unconsolidated: S 87-140 and S 83-125. IT IS ORDERED that said motion is DENIED.

Petitioners' persistence in filing frivolous motions seeking relief which cannot be provided by this court amounts to an abuse of process for which petitioners may be sanctioned. (Appendix O).

The Attorney's Guide to the Seventh Circuit Court of Appeals.; Preparing and Filing the Appeal page 4.2a **§4.1 INTRODUCTION, §4.2 APPEALS FROM DISTRICT COURT DECISIONS. §4.2a Notice of Appeal.;** The formal contents of the notice are prescribed by rule 3(e) of the *Federal Rules of Appellate Procedure.; Rule 3(c) states:* "An appeal shall not be dismissed for informality of form or title of the notice of appeal."

When the notice of appeal is filed with the district court clerk, the appellant must pay the clerk of that district court the required ("paid two hundred ten dollars".) fees, unless in forma pauperis status has been granted. These fees have two components. Section 1917 of United States Code title 28 directs that when any separate or joint notice of appeal is filed, a $5 fee must be paid to the district court clerk; this is called the notice of appeal filing fee. Rule 3(e) of the **Federal Rule of Appellate Procedure** further states that the docket fee prescribed by the Judicial Conference of the United States is to be received by the district court clerk on behalf of appeals. The Judicial conference's schedule of fees for a case on appeal or review has been **$100.** Thus, the total amount to be paid to the district clerk (Appendix 23-25) when filing a notice of appeal is **$105.** One check in this amount is acceptable for both the **$100** appellate docketing fee and the **$5** district court notice of appeal filing fee. **page's 4-3, 4-4** of the attorney's guide to the Seventh Circuit.

Rule 42 As Set Forth In The Federal Rules Of Civil Procedure Rule 42(a) 28 U.S.C.A. Supercedes 4.2d Related Appeals As Promulgated By The United States Appellate Court, Seventh Circuit.

§4.2d Related Appeals. The term "related appeals" is used by the Seventh Circuit clerk's office as a catchall

("February 23, 1988 Before Hon. Joel M. Flaum, Hon. Frank H. Easterbrook, and Hon. Kenneth F. Ripple")

§4.2d(1) Joint and Consolidated Appeals

Consolidated or joint appeals may be appropriate in two situations: (1) if a party is simultaneously involved in two similar appeals, or **(2) if two appeals involve similar or identical facts and legal issues.** phrase to include **("To the contrary in the Petitioner Case, Case Numbers S 87-00140, S 83-00125, and Case No. 87-2787 in the Federal Court of Appeals Seventh Circuit")** consolidated appeals, joint appeals, and cross-appeals. At the time of docketing, related appeals are highlighted so that it may be promptly determined whether should be briefed and argued together.; **page 4-9 The Attorney's Seventh Circuit Guide.**

In the United States District Court of Indiana South Bend Division

It is Abundantly clear on the 14th day of August, 1987 Magistrate Gene B. Lee, Report and Recommendation. Page 1. paragraph 1. STATES: On May 7, 1987 the district court entered an order referring this case to the undersigned Magistrate to conduct hearings and submit proposed findings of fact and recommendations for the disposition of motions pursuant to §636(b)(1)(b) of the Federal Magistrate Act.

"Records of proceedings, Civil Docket Sheet Numbers S 83-125 page 4 of pages Referral date 5/7/84 NR. 56 ORDER. (SE) Lee, Judge. Docket No. S 87-00140 page 3 Date 8/12/87 NR. 52 ORDER of referral to Mag.

Gene B. Lee for hearing. "There were no hearing had." (SE) LEE, J." (Appendix F-H).

Page 1. Paragraph 2 STATES: Clyde and Ava Washington originally filed this lawsuit in the South Bend Division on March 24, 1983. At Record 87-2787 BR, filed December 15, 1987, Report and Recommendation. Paragraph 3. STATES: The complaint alleges that Anderson and Pugh committed conspiracy, racial discrimination and retaliation by withholding loan proceeds previously approved by First Federal in October of 1982.

Answer To Page 1 Paragraph 2.

That Clyde O. Ava B. Washington executed their Mortgage to First Federal on March 16, 1981. First Federal of LaPorte County, Indiana Breached that mortgage contract. That First Federal on March 13, 1981 promise to lend the Washington's $32,000.00.

That on October 30, 1981 First Federal by and through its agents, Anderson, Pugh, and Bicek did represent unto the Washington's that First federal would lend the Washingtons $32,600. and at the fore state amount represented 90% percent of the appraised value of their current real estate value. First Federal on October 30, 1981 withheld $234.72 for Mortgage Insurance premium. First Federal by and through its agent, Mr. H. James Pugh loaned to the Washingtons' an (amount risked) $23,490.16.

Paragraph 4. STATES: The Complaint alleges that Hoehner committed conspiracy, malpractice and denied plaintiffs' their due process rights by not representing them in an action filed in LaPorte County Court by Marshall Field and Company and Creditors Service Bureau. In addition, plaintiffs allege that Richard P.

Schaumann, an attorney retained by Creditors Service Bureau, committed perjury under oath during trial of the charge account matter in LaPorte County.

Answer To Paragraph 4.

That Clyde O. and Ava B. Washington retained the employment of John F. Hoehner, A.U.S.A. of Hammond, Indiana, while Mr. Hoehner was in private practice of law. The Washington's paid him $350.00 his Hoehner" required attorney fees for legal services's, in the LaPorte County Court-MC. Mr. Hoehner did not render legal services he promise Clyde O. and Ava Washington, "Ava B. Washington" on December 23, 1981.

Paragraph 6. STATES: On April 15, 1983 Marshall Field and Richard Schaumann filed to dismiss. Shortly thereafter, on April 28, 1983, Tom Naughton filed a motion to dismiss. John Hoehner filed a motion to dismiss and a motion for sanctions on November 4, 1983. On December 14, 1983 First Federal Savings and Loan Association, Orville Anderson and James Pugh filed a motion for summary judgment.

Answer To Paragraph 6.

That Marshall Field & Company 111 North State Street, Chicago, Illinois Jurisdiction founded on diversity of citizenship and amount. Plaintiffs' (hereinafter) Petitioners is a [citizen of the State of Indiana] and defendant (hereinafter) Respondent is a corporation incorporated under the laws of the State of Illinois having its place of business in a state other than the State of Indiana. The matter in controversy exceeds $5000. dollars. Jurisdiction founded on existence of a Federal question an amount in controversy. The action arises under [the Constitution of

the United States, Article VII the 7th and 14th Amendments to the Constitution of the United States, Statute 42, U.S.C. 1983 et seq., Title 18, Secs. 241 and 242.; The Federal Fair Debt Collection Practice Act, 15 U.S.C. §1601 et seq.; Illinois Statute 38 §17-3 Forgery, See, e.g., *Forrester v. White*, 108 S. Ct. 538 (1988); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Imbler v. Pachtman*, 424 U.S. 409 (1976).

In the United States Court of Appeals Seventh Circuit

The United States Court of Appeals, Seventh Circuit, November 22, 1988. Before Honorable Walter J. Cummings, Honorable Kenneth F. Ripple, Honorable Daniel A. Manion, ORDER.

Clyde O. and Ava B. Washington, proceeding pro se, appeal the district court's grant of summary judgment on behalf of defendants and the dismissal of their ("United States Magistrate Gene B. Lee, Findings of Fact.; As indicated previously, the Washingtons' complaint contains three separate claims against the nine defendants. Paragraph 2, names defendants Anderson and Pugh.; Paragraph 3, names defendant Hoehner.; Paragraph 4, names defendants Krausch, Naughton, and Schaumann a total of six (6) defendants. *Black's Law Dictionary* p. 377 refers to defendants as person, not buildings.; The person defending or denying. a *Merriam-Webster Dictionary* p. 333 defen-'dant adj (14c); being on the defensive: DEFENDING [2] defendant (15c): a person required to make answer in a legal action or suit – compare PLAINTIFF. The U.S. magistrate left the additional 3 defendants (persons) unnamed") in his report and recommendation.

Dismissal and/or Summary judgment. Stating that the Washington's complaint was not a "model of clarity," the magistrate construed each of the three separate claims

as attempting to state a cause of action for violations of 42 U.S.C. §1983.

The federal law which is threatened by the Appellate Court's holding in this case is the immunity from the burdens of litigation and damages enjoyed by public official, the powerful, and the wealthy defendants sued in cases brought under the Civil Rights Act. Title 42, U.S.C. 1983 et seq.; Title 18, Secs. 241 and 242.

If the Appellate Court of the Seventh Circuit is permitted to enact rules which are inconsistent and/or contrary to the Rules of Federal Appellate Procedure, and therefore inconsistent with Rules as promulgated in other Federal District Court Circuits then the law shall not apply to all persons in a like manner, thereby subjecting persons to arbitrary exercises of capricious judicial power. This court is compelled to protect Petitioner's rights (sic. pursuant to the Rules of Federal Appellate Procedure). *Caldwell v. State of Texas*, Tex. 1891 S.Ct. 224, 137 U.S. 692.

If the Appellate Court of the Seventh Circuit is permitted to enact rules which are inconsistent and/or contrary to the Rules of Federal Civil Procedure, and therefore inconsistent with Rules as promulgated in other Federal District Court Circuits then the law shall not apply to all persons in a like manner, thereby subjecting persons to arbitrary exercises of judicial power. This Court is compelled to protect Petitioner's rights (sic. pursuant to the Rules of Civil Procedure). *Brooks v. Pennsylvania R.Co.*, 91 F. Supp. 101; *Conley v. Gibson*, certiorari to the (5th Cir.) 355 U.S.; *Haines v. Kerner, certiorari* to the (7th Cir.) 404 U.S.; *Caldwell v. State of Texas*, Tex. 1981 S. Ct. 224, 137 U.S. 692.; *Nanez v. Ritger*, 304 F. Supp. 355, 356

(1969).; *Burt v. City of New York*, 156 F.2d 791.; *Wilson v. Standefer*, Tex. 1902, 22 S. Ct. 384, 184 U.S. 399.

The law of the land with regard to the method a party may avail themselves of their right of due process of federal civil procedure and espoused through the Rules of Federal Appellate Procedure. If those rules are abridged within a circuit, the rights to which those persons within that circuit would otherwise have become abrogated. *Walker v. Sauvinet*, La. 1875, 92 U.S. 90; *Owens v. Battenfield*, C.C.A. Okla. 1929, 33 F.2d 753, *certiorari denied* 50 S.Ct. 88, 280 U.S. 605. The Federal Appellate Court Seventh Circuit by virtue of local circuit rules 34(f) has violated the intent of 28 U.S.C. §2071. As well as rule 47 of the Rules of Appellate Procedure, Title 28 U.S.C. §2071 is a statute promulgated by Congress pursuant to Article 1 §8 CL. 9 of the United States Constitution. *Brown v. E.W. Bliss Co.*, (C.A. 8 Mo. 1987); 818 F.2d 1405.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

CLYDE O. WASHINGTON and
AVA B. WASHINGTON
203 Westwind Drive
P.O. Box 8834
Michigan City, Indiana 46360
(219) 872-6836

APPENDICES

The Two Prior Federal and State Court Actions, The Court of Appeals of Indiana Actions, and The Federal Court of Appeals, Seventh Circuit Actions Concerning The Same Transaction.

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

CLYDE O. WASHINGTON and AVA B. WASHINGTON,	)	
Plaintiffs,	)	
v.	)	S83-125
MARSHALL FIELD & COMPANY, RICHARD P. SCHAUMANN, JOHN F. HOEHNER, and FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LAPORTE COUNTY,	)	
Defendants	)	

ORDER

This case is presently before the court on defendant Marshall Field & Company's motion to dismiss. The motion is hereby ORDERED converted to a motion for summary judgment. The defendant Marshall Field & Company is given to and including May 17, 1983, within which to file any supplemental pleadings in support of said motion. The plaintiffs are given to and including June 17, 1983, within which to file any response to said motion.

Pursuant to *Lewis v. Faulkner*, 689 F.2d 100 (7th Cir. 1982), plaintiffs' attention is directed to Rule 56(e) of the Federal Rules of Civil Procedure, which reads, in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of

his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Plaintiffs are admonished that their failure to respond to the motion for summary judgment may result in summary judgment being entered against them.

Entered this 28th day of April, 1983.

/s/ Allen Sharp
CHIEF JUDGE,
UNITED STATES
DISTRICT COURT

cc: C. & A. Washington
C. Kitowski
D. Hanson
R. Schaumann
E. Krausch
T. Naughton
Creditors Service of Mich. City

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

CLYDE O. WASHINGTON and AVA B. WASHINGTON,	)	
Plaintiffs,	)	
vs.	)	Cause No. S83-125
MARSHALL FIELD & COMPANY, et al.,	)	
Defendants.	)	

ORDER

The plaintiffs are hereby given until June 17, 1983, to file any responses to all pending motions to dismiss filed in this case. SO ORDERED.

/s/ Allen Sharp
CHIEF JUDGE,
UNITED STATES
DISTRICT COURT

Enter: May 11, 1983

cc: Clyde & Ava Washington
C. Kitowski
D. Hanson
R. Schaumann
E. Krausch
Creditors Service of Michigan City

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

CLYDE O. WASHINGTON and
AVA B. WASHINGTON,

V.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION ET AL

No. S83-125

ORDER FOR PRETRIAL CONFERENCE

The attorneys for the several parties to this action are hereby directed to appear before the undersigned Judge of this Court in the United States Court House on NOVEMBER 4, 1983 at 2:30 o'clock P.M., for a pretrial conference to consider:

1. All pending motions;

2. The simplification of the issues;

3. The necessity or desirability of amendments to the pleadings;

4. Appropriate timetables to aid in the disposition of this action.

IT IS ORDERED that not less than ten days prior to the pretrial conference, counsel for each of the parties shall hold a conference in the absence of the Court in accordance with Rule 12 and Appendix A of the Rules of the United States District Court for the Northern District of Indiana.

IT IS FURTHER ORDERED that counsel attending the pretrial conference be fully aware of the schedules of all trial counsel to be involved in the action to enable this Court to set a firm trial setting.

Enter AUGUST 4, 1983

/s/ Allen Sharp
CHIEF JUDGE,
UNITED STATES
DISTRICT COURT

cc: C. & A.Washington
C. T. Kitowski
D. Hanson
R. Schaumann
Calendars
Chambers

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

CLYDE O. WASHINGTON, et al.,

Plaintiffs,

v. S83-125

FIRST FEDERAL SAVINGS & LOAN ASS'N, et al.,

Defendants.

ORDER

This case is now assigned to the Honorable William C. Lee, a Judge of this court, for all further necessary proceedings.

Entered this 8 day of December, 1983.

/s/ Allen Sharp
Chief Judge,
United States District Court

cc: Clyde & Ava Washington
C. Kitowski
D. Hanson
R. Schaumann
Magistrate Lee

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

CLYDE O. WASHINGTON and AVA B. WASHINGTON, Plaintiffs,	)	
v.	)	CIVIL NO. S 83-125
MARSHALL FIELD & CO., RICHARD P. SCHAUMANN, JOHN F. HOEHNER, THOMAS NAUGHTON, FIRST FEDERAL SAVINGS & LOAN, ORVILLE ANDERSON, JAMES PUGH, ELDON KRAUSCH, and CREDITORS SERVICE OF MICHIGAN CITY, IN., Defendants	)	

ORDER

(Filed January 12, 1984)

To the above named plaintiffs:

Defendant John F. Hoehner has filed a Motion for Sanctions against you due to your failure to appear for depositions, rescheduled from October 25, 1983 to December 3, 1983 at 10:00 a.m. You were ordered to appear December 3, 1983 for said depositions at a pretrial conference, held November 4, 1983 before the Honorable Allen Sharp of this court, by Chief Judge Sharp. Defendant Hoehner alleges that counsel for all defendants were present and a record was made of your failure to appear as ordered by Judge Sharp. Defendant asks this court to

dismiss your case with prejudice as the appropriate sanction for your alleged violation of a direct order of this court. This means that your case would be dismissed and you would not be permitted to pursue it further.

Plaintiffs are hereby provided twenty (20) days from the date you receive this notice in which to respond to the motion for sanctions filed against you. Although the filing of a response will not guarantee the denial of defendant's motion for sanctions, your response will enable the court to consider more meaningfully all relevant factors. If, however, you fail to respond to the motion for sanctions, the court will still reexamine defendant's motion and may grant defendant's request for sanctions in the form of a dismissal with prejudice of the entire case.

It is, therefore, ORDERED that you are provided twenty (20) days from your receipt of this notice in which to respond to defendant's motion for sanctions.

Enter: January 12, 1984.

/s/ William C. Lee
William C. Lee, Judge
United States District Court

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

CLYDE O. WASHINGTON, ET AL.,

Plaintiffs,

v. CIVIL NO. S 83-125

MARSHALL FIELD & COMPANY, ET AL.,

Defendants.

ORDER REFERRING CASE TO
THE UNITED STATES MAGISTRATE

IT IS ORDERED that this case be referred to Gene B. Lee, United States Magistrate, for the following reason(s):

(x) The referral is made pursuant to 28 U.S.C. § 636(b)(1)(A) and Magistrate's Rule M-2(a) for hearing and determination of any motion not excepted by 28 U.S.C. § 636(b)(1)(A).

(x) The referral is made pursuant to 28 U.S.C. § 636(b)(1)(B) and (C) and Magistrate's Rule M-3(a) for hearings, including evidentiary hearings, and submission of proposed findings of fact and recommendations for disposition, by this court, of any motion excepted by 28 U.S.C. § 636(b)(1)(A).

(x) The referral is made pursuant to Magistrates Rule M-5(b) for pre-trial proceedings, including pre-trial conferences, settlement conference, and preparation and submission of pre-trial order.

( ) Other reason(s), specify:

Enter: May 7, 1984

(signed)
William C. Lee, Judge
United States District Court

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

CLYDE O. WASHINGTON
AVA B. WASHINGTON

Plaintiffs,

v. Cause No. S 87-140

FIRST FEDERAL SAVINGS AND LOAN ASS'N OF LAPORTE COUNTY; MARSHALL FIELD & CO.; DONALD D. MARTIN, JUDGE, LAPORTE SUP. COURT NUMBER ONE; BETHLEHEM EMPLOYEES FEDERAL CREDIT UNION; FEDERAL HOME LOAN BANK BOARD; NATIONAL CREDIT UNION ADMINISTRATION; CREDIT BUREAU SERVICES, INC.; DOUGLAS M. GRIMES, P.C.; ORVILLE L. ANDERSON, PRES., FIRST FEDERAL OF LAPORTE COUNTY; RITA M. BICEK; FRANCIS PASSARELLI; JOSEPH VASS; B.W. DONOHO,

Defendants.

ORDER

The plaintiffs in this case filed an earlier action in this court which was docketed as Cause Number S 83-125. That case names many of the same defendants and appears to involve common questions of law and fact.

Pursuant to Rule 42(a) of the Federal Rules of Civil Procedure,

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue

in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Cause numbers S 87-140 and S 83-125 are hereby consolidated and the same are assigned to the Honorable William C. Lee. SO ORDERED.

Dated this 5th day of August, 1987.

/s/ Allen Sharp
Chief Judge,
United States District Court

cc: Washington, Price, Grimes, Livarchik, Baldwin, Ribnick, AUSA, 1st Fed Lpt, Anderson, Pugh, Bicek, Cred. Bur, J. Wm. Lee, FW Ck

APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

CLYDE O. WASHINGTON, ET AL.,

Plaintiffs,

v. CIVIL NO. S 87-140

FIRST FEDERAL OF LAPORTE, ET AL.,

Defendants.

ORDER

It is ordered that this case is referred to Gene B. Lee, United States Magistrate for this District, for hearing, including any evidentiary hearings, and determination of any pre-trial motion, submission of proposed findings of fact and recommendations for disposition by this court pursuant to 28 U.S.C. § 636(a) and (b)(1), and Local Rule M-1(a), (d), and (i)(2).

Enter: August 11, 1987.

/s/ William C. Lee
William C. Lee, Judge
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

CIVIL NO. S 83-125

No. 87-2787

CLYDE O. WASHINGTON and AVA B. WASHINGTON,

Plaintiffs,

v.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION; ORVILLE ANDERSON; JAMES PUGH; JOHN F. HOEHNER; MARSHALL FIELD & COMPANY; ELDON KRAUSCH; TOM NAUGHTON; RICHARD P. SCHAUMANN; and CREDITORS SERVICE OF MICHIGAN CITY, INDIANA,

Defendants.

ORDER

This matter is before the court on a Report and Recommendation filed by the United States Magistrate on August 14, 1987. Plaintiffs filed what they entitled a "Reply, Clarification and Objections" to the Report on August 31, 1987. Defendant John F. Hoehner filed a response to plaintiffs' filings on September 14, 1987. For the reasons set forth below, this court will accept and adopt the Report and Recommendation of the Magistrate.

Discussion

As the Magistrate aptly noted, plaintiffs' "complaint is not a model of clarity." (Rec. 73, p. 9). More than that, the pleadings filed by the plaintiffs are rambling, conclusory and frequently incoherent.

Plaintiffs' *pro se* complaint alleges various acts of racial discrimination and civil rights violations by numerous parties. In essence, plaintiffs' complaint is

composed of three separate and distinct claims against various defendants.

With respect to defendants First Federal Savings and Loan Association of LaPorte County, Orville Anderson, and James Pugh, the complaint alleges that Anderson and Pugh, officers of First Federal, committed conspiracy, racial discrimination and retaliation by withholding loan proceeds previously approved by First Federal in October of 1982.

With respect to plaintiffs' claim against John Hoehner, plaintiffs allege that Mr. Hoehner, while in private practice, committed conspiracy and malpractice by not representing them in an action filed in the LaPorte County Court by Marshall Field & Company and Credit Service Bureau. That defendant's action, according to plaintiffs, caused emotional trauma and resulted in a lien being placed against their property.

Plaintiffs' third claim is directed against Marshall Field & Company, Eldon Krausch, Richard Schaumann, and Creditors Service Bureau of Michigan City, Indiana. The basis for their claim is that on February 2, 1980, Marshall Field & Company, filed suit against the plaintiffs in the LaPorte Superior Court to collect a past due charge account balance owed by plaintiff Ava Washington. Judgment was entered for Marshall Field and Creditors Service Bureau for the sum of $2,735.14. Marshall Field then placed a lien against the personal and real property of the plaintiffs. There are also some allegations that Richard Schaumann, an attorney retained by Creditors Service Bureau, committed perjury while testifying

about the charge account matter in the LaPorte Superior Court.

It is apparent from the Magistrate's Report and Recommendation that he thoroughly reviewed and analyzed all of the pleadings and arguments raised by the plaintiffs. As required by *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 592 (1972), the Magistrate liberally construed the pleadings filed by the plaintiffs. Even with such a construction, the Magistrate concluded that all pending motions to dismiss and motions for summary judgment should be granted and that plaintiffs' complaint should be dismissed. The Magistrate entered a lengthy and thoughtful order supporting his conclusions.

At the close of his order, the Magistrate wrote that "pursuant to §636(b)(1)(c) of the Federal Magistrate Act, the parties have ten (10) days from service of this Report and Recommendation to file written objections to the proposed findings and recommendations with the district court." (Rec. 73, p. 16). Despite that notice, plaintiffs failed to file their objections within the ten (10) day time period.

A majority of the courts of appeal have determined that failure to file written objections within ten (10) days waives a party's right to object to the magistrate's proposed findings and recommendations. The United States Court of Appeals for the Seventh Circuit in *Hudson v. Nabisco Brands, Inc.*, 758 F.2d 1237 (7th Cir. 1985), reviewed the variety of approaches taken by the courts of appeals on the question of waiver, writing:

> Some courts have established an absolute rule of waiver with respect to any issue arising from the

magistrate's report to which objection is not made, *United States v. Schronce*, 727 F.2d 91, 94 (4th Cir. 1984), *cert. denied*, ___ U.S. ___, 104 S.Ct. 2395, 81 L.Ed.2d 352; *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603, 605 (1st Cir. 1980); *John B. Hull, Inc. v. Waterbury Petroleum Products, Inc.*, 588 F.2d 24, 29-30 (2d Cir. 1978), *cert. denied*, 440 U.S. 960, 99 S.Ct. 1502, 59 L.Ed.2d 773 (1979); *see also Camby v. Davis*, 718 F.2d 198, 200 n.2 (4th Cir. 1983) (dicta discussion waiver rule), while other courts condition any waiver upon a finding that the magistrate specifically admonished the parties that failure to file objections would constitute a waiver, *Siers v. Morrash*, 700 F.2d 113, 116 (3d Cir. 1983) (at least with respect to pro se litigants); *Nettles v. Wainwright*, 677 F.2d 404, 410 (5th Cir. 1982) (en banc), *on remand*, 677 F.2d 410 (5th Cir. 1982); *United States v. Walters*, 638 F.2d 947, 950 (6th Cir. 1981). Some courts hold that waiver applies only to issues of fact; thus, a party cannot waive a magistrate's incorrect application of the law even if the party fails to object. *Brue v. Heckler*, 709 F.2d 947, 939 (5th Cir. 1983) (alternative holding); *Britt v. Simi Valley Unified School District*, 708 F.2d 452, 454-55 (9th Cir. 1983). *See also Moawad v. Childs*, 673 F.2d 850, 851 (5th Cir. 1982) (pro se litigant "cannot be held to have waived an issue raised in his pleadings that is not covered in the magistrate's findings and recommendations"). Furthermore, the Eighth Circuit has rejected the waiver rule, at least to some extent, in *Messimer v. Lockhart*, 702 F.2d 729, 730-31 (8th Cir. 1983), which holds that a party cannot waive a question of law, but leaves open the questions whether the no-waiver rule would apply to an issue of purely historical fact and whether, in such a case, the magistrate must inform the parties that failure to file objections will result in waiver. *Accord Lorin Corp. v. Goto & Co.*, 700 F.2d 1202, 1207 (8th Cir. 1983). *Cf. Iten Leasing Co. v. Burroughs Corp.*, 684 F.2d 573, 575 (8th Cir. 1982) (parties' stipulated waiver of district court

> review of magistrate's factual findings does not preclude court of appeals' review of those findings under a clearly erroneous standard).

Hudson, supra, at 1241. After reviewing the approaches taken, the Seventh Circuit refused to decide the waiver question. *Id.*

In *Video Views, Inc. v. Studio 21, Ltd.*, 797 F.2d 538 (7th Cir. 1986), the United States Court of Appeals for the Seventh Circuit answered the question left unanswered in *Hudson* on the issue of waiver. In *Video Views*, the court "decide[d] to adopt the rule that failure to file objections with the district judge waives the right to appeal all issues, both factual and legal, based on the reasons set forth by the other courts of appeal." *Id.* at 539. In doing so, the court also wrote "that under certain circumstances the failure to file objections may be excused because the rule is not jurisdictional and should not be employed to defeat the 'ends of justice.' " *Id.* at 540, *quoting United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981).

In the present matter, it could very well be that the plaintiffs have waived their right to object to the Magistrate's Report and Recommendation by not filing timely objections even though they were apprised of that right by the Magistrate. Moreover, the objections filed by the plaintiffs are not really objections at all but rather are conclusory statements and allegations and consist in large part of restatements of the claims they had raised in their complaint. The objections to the Report are totally unfocused. "A blunderbuss objection of this sort is, in the view of this court, no objection at all." *Sackall v. Heckler*, 104 F.R.D. 401, 403 (D.R.I. 1984). "Accordingly, the report

should be approved for this reason alone, in the absence of clear error on the face of the record." *Id.*

Although plaintiffs' failure to file timely objections may have waived their right to review by this court, this court has nevertheless undertaken a *de novo* review of the entire record. The facts put forward by the plaintiffs are thoroughly covered by the Report of the Magistrate and it would be pleonastic to repeat them here. It suffices to note on this score that the facts found by the Magistrate are supported by the record. Further, the Magistrate painstakingly applied the law to those facts. This court's independent review leads it to conclude that the Magistrate's disposition of the pending motions was correct.

Conclusion

For the reasons set forth above, plaintiffs' objections (such as they are) to the Report and Recommendation of the Magistrate must be and hereby are OVERRULED. The recommendations contained in the Report are ACCEPTED, APPROVED and CONFIRMED.

Enter: October 6, 1987.

/s/ William C. Lee
Judge
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

JUDGMENT IN A CIVIL CASE
CASE NUMBER: S 83-00125

CLYDE O. WASHINGTON and AVA B. WASHINGTON,

v.

FIRST FEDERAL SAVINGS & LOAN ASSOC., ORVILLE ANDERSON, JAMES PUGH, JOHN F. HOEHRNER, MARSHALL FIELD & COMPANY, ELDON KRAUSCH, TOM NAUGHTON, RICHARD SCHAUMANN; and CREDITORS SERVICE OF MICHIGAN CITY, INDIANA

( ) Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(x) Decision by Court. This action came to consideration before the Court. The issues have been determined and a decison has been rendered.

IT IS ORDERED AND ADJUDGED judgment is entered in favor of the defendants, First Federal Savings & Loan Assoc., Orville Anderson, James Pugh, John F. Hoehner, Marshall Field & Co., Eldon Krausch, Tom Naughton, Richard Schaumann and Creditors Service of Michigan City, Indiana, and against the plaintiffs, Clyde O. Washington and Ava B. Washington.

Richard E. Timmons
Clerk

/s/ Lana R. Melton
(*By*) *Deputy Clerk*

October 7, 1987
Date

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
NO. 87-2787

Clyde O. Washington and Ava B. Washington Plaintiffs-Appellants	IN RE: NOTICE OF APPEAL
VS.	DISTRICT COURT ND. S83-00125 and S87-00140 UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF INDIANA SOUTH BEND DIVISION
First Federal Savings & Loan Ass'n of LaPorte County Marshall Field & Company Donald D. Martin, Judge of LaPorte Superior Court Number One Bethlehem Employees Fed. Credit Union Federal Home Loan Bank Board National Credit Union Adm. Credit Bureau Services Douglas M. Grimes, P.C., et al; Defendants-Appellee	

RE: NOTICE OF APPEAL FEE'S PAID,
U.S. DIST. COURT
OFFICE OF THE CLERK
U.S. COURT OF APPEALS: NO. 87-2787

Enclosed please find and made a part of the RECORDS of CAUSE NUMBER 87-2787, copies of receipt No. 9763 Date: November 2, 1987 paid by cash, and receipt No. 9807 Date: November 5, 1987 paid by Money Order No. 275524 by U.S. Certified Mail, mailed on November 4th, 1987. Plaintiff-Appellant Ava B. Washington on November 2nd, 1987 P.M. was specially told by the Clerk signer

of Receipt No. 9763 dated November 2nd, 1987, and another man behind the counter seated at a desk "You be sure and send One Hundred Five dollars ($105.00) additional, otherwise the Appeals Court will just dismiss the other one."

On Friday, November 6, 1987 we received the enclosed attached copies to be made a part of the Records (File) of U.S. Court of Appeals Record-File No. 87-2787.

Respectfully Submitted,

/s/ Ava B. Washington
Ava B. Washington

cc: U.S. District Court, C. T. Kitowski, Livarchik, Baldwin, Grimes, Credit Bureau Services, Marshall Field & Co., Johnson, Hanson, Schaumann, Spangler, Jennings, Spangler, Dougherty

---

ORIGINAL
RECEIPT FOR PAYMENT

UNITED STATES DISTRICT COURT 9763
for the
NORTHERN DISTRICT OF INDIANA
Office of the Clerk
at South Bend, IN

RECEIVED FROM

Ava B. Washington

Notice of appeal

Account Code

100 DEPOSIT FUND
101 Trustee Fees

102 Restitution
200 REGISTRY FUND
201 Cash Bail
202 Land Condemnation
GENERAL AND SPECIAL FUND
310 Immigration Fees
320 Attorney Admission Fee
330 Filing Fees
331 Civil Cases
332 Writ of Habeas Corpus
333 Appeals
334 Bankruptcy Cases (Clerk's Fee)
340 Sale of Publications
350 Copy Fees
360 Miscellaneous Fees
380 Recoverers of Costs
390 Bankruptcy Filing Fees and Special Charges
FINES, PENALTIES AND FORFEITURES
410 Agricultural Laws
420 Economic and Stabilization Laws
430 Immigration and Labor Laws
440 Customs, Commerce and Anti-Trust Laws
450 Narcotics, Prohibition and Alcohol Laws
460 Forfeitures of Unclaimed Money and Property
470 Mining Enforcement and Safety Administration
480 Internal Revenue Service (Criminal Fines)
490 Collateral Forfeitures (CVB)
500 Appearance Bond Forfeitures and
Other Fines, Penalties or Forfeitures
Not Otherwise Classified

ACCOUNT	AMOUNT
330	105.00
TOTAL	$105.00

Case Number or Other Reference
S87-140, S83-125

CHECKS AND DRAFTS ARE ACCEPTED SUBJECT TO COLLECTION AND FULL CREDIT WILL ONLY BE GIVEN WHEN THE CHECK OR DRAFT HAS BEEN

ACCEPTED BY THE FINANCIAL INSTITUTION ON WHICH IT WAS DRAWN.

DATE	Cash	Check	M.O.
Nov. 12, 1987	X		

/s/ Ed Clements
DEPUTY CLERK

ORIGINAL
RECEIPT FOR PAYMENT

UNITED STATES DISTRICT COURT 9807
for the
NORTHERN DISTRICT OF INDIANA
Office of the Clerk
at South Bend, IN

RECEIVED FROM

Ava B. Washington

Account Code

100 DEPOSIT FUND
- 101 Trustee Fees
- 102 Restitution

200 REGISTRY FUND
- 201 Cash Bail
- 202 Land Condemnation

GENERAL AND SPECIAL FUND

310 Immigration Fees
320 Attorney Admission Fee
330 Filing Fees
- 331 Civil Cases
- 332 Writ of Habeas Corpus
- 333 Appeals
- 334 Bankruptcy Cases (Clerk's Fee)

340 Sale of Publications

350 Copy Fees
360 Miscellaneous Fees
380 Recoverers of Costs
390 Bankruptcy Filing Fees and Special Charges
FINES, PENALTIES AND FORFEITURES
410 Agricultural Laws
420 Economic and Stabilization Laws
430 Immigration and Labor Laws
440 Customs, Commerce and Anti-Trust Laws
450 Narcotics, Prohibition and Alcohol Laws
460 Forfeitures of Unclaimed Money and Property
470 Mining Enforcement and Safety Administration
480 Internal Revenue Service (Criminal Fines)
490 Collateral Forfeitures (CVB)
500 Appearance Bond Forfeitures and
Other Fines, Penalties or Forfeitures
Not Otherwise Classified

ACCOUNT	AMOUNT
100	105.00

TOTAL $105.00
Case Number or Other Reference
S87-140

CHECKS AND DRAFTS ARE ACCEPTED SUBJECT TO COLLECTION AND FULL CREDIT WILL ONLY BE GIVEN WHEN THE CHECK OR DRAFT HAS BEEN ACCEPTED BY THE FINANCIAL INSTITUTION ON WHICH IT WAS DRAWN.

DATE Cash Check M.O.
Nov. 5, 1987 X

/s/ Ed Clements
DEPUTY CLERK

UNITED STATES POSTAL SERVICE
OFFICIAL BUSINESS

SENDER INSTRUCTIONS
Print your name, address, and ZIP Code in the space below.
- Complete items 1, 2, 3, and 4 on the reverse.
- Attach to front of article if space permits, otherwise affix to back of article.
- Endorse article "Return Receipt Requested" adjacent to number.

U.S.MAIL

PENALTY FOR PRIVATE USE, $300

RETURN TO

Print Sender's name, address, and ZIP Code in the space below.

C.O. WASHINGTON
P.O. BOX 8834
MICHIGAN City, IN 46360

SENDER: Complete items 1 and 2 when additional services are desired, and complete items 3 and 4.

Put your address in the "RETURN TO" space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for additional service(s) requested.

1. ☒ Show to whom delivered, date, and addressee's address. 2. ☐ Restricted Delivery.

3. Article Addressed to:
THE UNITED STATES COURT OF APPEALS
SEVENT CIRCUIT
219 South Dearborn ST
Chicago, IL 60604

4. Article Number P 259 490 972

Type of Service:
☐ Registered ☒ Certified ☐ Express Mail ☐ Insured ☐ COD

Always obtain signature of addressee or agent and DATE DELIVERED.

5. Signature – Addressee
X Eve Ford

6. Signature – Agent
X

7. Date of Delivery NOV 16 1987

8. Addressee's Address (ONLY if requested and fee paid)

PS Form 3811, Feb. 1986 DOMESTIC RETURN RECEIPT

APPENDIX J

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
NO. 87-2787

Clyde O. Washington and Ava B. Washington Plaintiffs-Appellants VS. First Federal Savings & Loan Ass'n of LaPorte County Marshall Field & Company Donald D. Martin, Judge of LaPorte Superior Court Number One Bethlehem Employees Fed. Credit Union Federal Home Loan Bank Board National Credit Union Adm. Credit Bureau Services Douglas M. Grimes, P.C., et al; Defendants-Appellee	IN RE: NOTICE OF APPEAL DISTRICT COURT ND. S83-00125 and S87-00140 UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF INDIANA SOUTH BEND DIVISION

STATEMENT OF THE ISSUES APPELLANTS INTEND TO PRESENT ON THE APPEAL

COMES NOW the Appellants Clyde O. Washington and Ava B. Washington, Pursuant to Federal Rule of Appellate Procedure 10: Rule 10.b(1) (2) (3).

1. Marshall Field & Company – Home Plan Agreement.

2. Transcript Proceeding: State of Indiana, LaPorte County Cause No. LPC-MC-80-2P-340. June 12, 1980.

3. The employment of John F. Hohner, Attorney at Law. December 24, 1981.

4. Mortgage contract/Note between First Federal Savings & Loan of LaPorte County, and Clyde O. and Ava B. Washington Dated, executed March 16, 1981.

5. Consent agreement between First Federal of LaPorte County, Clyde O. and Ava B. Washington. The Indiana Civil Rights Commission, October 19, 20, 1981.

6. Real Estate Mortgage Contract between First Federal Savings & Loan of LaPorte County, and Clyde O. and Ava B. Washington dated October 30, 1981.

7. Correspondence and personal visit to Home Loan Bank board office(s), Washington, DC.

8. Bank account book/number received through the U.S. Mail from First Federal Savings & Loan Assn. of LaPorte County.

9. Sheriffs sale notice/auction March 6, 1986.

10. Record/filings in the LaPorte County Superior Court Number One, October 7, 1985 filed by First Federal Savings & Loan Assn. of LaPorte County, and transcript of the trial proceedings. The LaPorte County Superior Court lack of Jurisdiction.

11. The Appeals Court of Indiana Conclusion Ruling.

12. The employment of Douglas M. Grimes, P.C.

13. The Notice of (Refer to Maker) Bethlehem Employees Federal Credit Union.

14. Notice to the LaPorte County Sheriffs Department, Sheriff Kenneth E. Layton.

15. The record of Entry by Force and the removal and damage to appellants property from their homestead.

16. The Record Filing of Complaint, March 9, 1987 in the U.S. District Court, South Bend Division.

17. Plaintiffs-Appellants filing of Objection, Clarification of Magistrate Gene B. Lee on August 28, 1987.

18. Refusal to Consent, and trial by jury.

Respectfully Submitted,

Clyde O. and Ava B. Washington

by: /s/ Ava B. Washington
Ava B. Washington

cc: U.S. District Court, C. T. Kitowski, Livarchik, Baldwin, Grimes, Credit Bureau Services, Marshall Field & Co., Johnson, Hanson, Schaumann

APPENDIX K

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 23, 1988.

Before

Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*

No. 87-2787
CLYDE O. WASHINGTON and AVA B. WASHINGTON,

Plaintiffs-Appellants,

v.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, et al.,

Defendants-Appellees.

---

*Appeal from the United States District Court for the Northern District of Indiana, South Bend Division. No. 83 C 125 – **William C. Lee**, Judge.*

This matter comes before the court for its consideration of the following documents:

1. "MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR ENLARGEMENT OF TIME TO FILE APPELLEE'S BRIEF" filed herein on January 14, 1988 by counsel for the appellee.

2. "NOTICE OF NON-INVOLVEMENT OR ALTERNATIVELY A MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION" filed herein on January 19, 1988 by counsel for the National Credit Union Administration.

3. "APPELLANT'S MOTION TO STRIKE PORTIONS OF APPELLEE'S ANSWER AND CROSS-ACTION" filed herein on February 11, 1988.

4. "DEFENDANT, JOHN F. HOEHNER'S RESPONSE TO NATIONAL CREDIT UNION ADMINISTRATION'S NOTICE OF NON-INVOLVEMENT OR ALTERNATIVELY A MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION" filed hereon on February 16, 1988.

This is an appeal from an order entered by Judge Lee in case number S83-125 on October 6, 1987 granting defendants' motion to dismiss. Case S83-125 was assigned to Judge Lee by Judge Sharp on December 8, 1983. Although Judge Sharp issued an order on August 5, 1987 consolidating this case with a related cause of action, S87-00140, and assigning the latter case to Judge Lee, Judge Sharp was without authority to consolidate the cases because case S83-125 was no longer assigned to him. Accordingly, we deem Judge Sharp's order of August 5, 1987 to be a simple order of assignment, rather than one of consolidation.

It is clear that the magistrate's report and recommendation of August 14, 1987 and Judge Lee's order of October 6, 1987 adopting that report pertain exclusively to case S83-125. Because there was no effective consolidation of cases S83-125 and S87-00140, Judge Lee's October

6 order, is a final appealable order with respect to case S83-125. This court therefore has subject matter jurisdiction over the instant appeal. Contrary to appellant's assertions, however, the appeal is limited to a review of Judge Lee's October 6 order granting the defendants' motions to dismiss in case S83-125 and the only proper appellees in this appeal are the defendants in case S83-125.

Accordingly, we acknowledge the non-involvement of Donald D. Martin and National Credit Union Administration (NCUA) in this appeal and hereby correct the caption to name only the following parties as appellees: First Federal Savings and Loan Association; Orville Anderson; James Pugh; John F. Hoehner; Marshall Field & Company; Eldon Krausch; Tom Naughton; Richard P. Schaumann; and Creditors Service of Michigan City, Indiana. All filings in this appeal shall contain the corrected caption and appellants shall only serve papers on the parties listed in the caption. Because Mr. Martin and NCUA were never parties to this appeal it is unnecessary to dismiss the appeal as to them, and their motions to dismiss are therefore DENIED. Appellants' motion to strike is also DENIED.

APPENDIX L

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

March 10, 1988.

By the Court:

No. 87-2787

CLYDE O. WASHINGTON and AVA B. WASHINGTON, Plaintiffs-Appellants, vs. FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, et al., Defendants-Appellees.	Appeal from the United States District Court for the Northern District of Indiana South Bend Division No. 83 C 125 Judge William C. Lee

CIRCUIT RULE 34(f) NOTICE

It has been suggested that oral argument may not be helpful in deciding this case. If there is no oral argument, a panel of three judges will decide this case on the basis of the briefs and record. Within fourteen (14) days of the date of this notice any party to this appeal may file a "STATEMENT AS TO NEED FOR ORAL ARGUMENT," suggesting reasons why oral argument may be necessary for proper resolution of the issue presented. An original and three (3) copies of your statement must be filed with the Clerk of this Court, together with proof of service on opposing counsel. Such statement will be considered, but oral argument may or may not be granted. See Rule 34 of the Federal Rules of Appellate Procedure and Rule 34(f) of the Circuit Rules of the Seventh Circuit.

If the court decides that oral argument would not be helpful, the next document you will receive regarding this matter will be the final decision. That decision will be reached by a panel of three (3) judges after submission of the record and briefs already filed herein. On the other hand, if the court decides that oral argument would be helpful, the next document you will receive concerning this matter will be a "Notice of Oral Argument." Such notices are sent out approximately four (4) weeks in advance of the date scheduled for oral argument.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CASE NO. 87-2787

CLYDE O. WASHINGTON and AVA B. WASHINGTON Plaintiffs-Appellants vs. FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LAPORTE COUNTY, MARSHALL FIELD AND COMPANY, CREDITORS SERVICE OF MICHIGAN CITY, INDIANA, ORVILLE ANDERSON, JAMES PUGH, ELDON KRAUSCH, TOM NAUGHTON, RICHARD SCHAUMANN, JOHN F. HOEHNER, Defendants-Appellees	) Appeal from the U.S. District Court, Northern District of Indiana, Hammond Division) Civil No. S83-00125) The Honorable William C. Lee, Judge Presiding

---

STATEMENT OF DEFENDANT-APPELLEE, JOHN F. HOEHNER, IN OBJECTION TO SETTING THIS MATTER FOR ORAL ARGUMENT

The defendant-appellee, John F. Hoehner, respectfully requests that this case be decided without resort to Oral Argument pursuant to Federal Rule of Appellate Procedure 34(a) and Circuit Rule 34(f). It is the position of the defendant-appellee, that this appeal is frivolous and will needlessly burden the Court's calendar. Finally, the facts and legal arguments are adequately presented in the various appellee's briefs and the record, such that the decisional process will not be significantly aided by Oral Argument.

APPENDIX M

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 1, 1988.

Before
Hon. RICHARD D. CUDAHY, *Circuit Judge*

No. 87-2787
CLYDE O. WASHINGTON and AVA B. WASHINGTON,
Plaintiffs-Appellants,

vs.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
No. 83-C-125 – Hon. **William C. Lee,** *Judge.*

ORDER

On consideration of the "MOTION FOR CONSOLIDATION OF CAUSE NUMBER S83-125 PENDING IN THE UNITED STATES COURT OF APPEALS. AND THE SECOND COMPLAINT. AMENDED COMPLAINT CAUSE NUMBER S87-140 PENDING IN THE UNITED STATES DISTRICT COURT, SOUTH BEND IN THE UNITED

STATES DISTRICT COURT FOR THE NORTHERN DIVISION" filed by *pro se* appellants on March 24, 1988,

IT IS ORDERED that the motion to consolidate is DENIED. Only appeals may be consolidated. *See* Fed. R. App. P. 3(b). District court Case No. S87-140 remains pending in the district court.

APPENDIX N

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 15, 1987.

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge**
Hon. FRANK H. EASTERBROOK, *Circuit Judge**

No. 87-1618
IN THE MATTER OF:
CLYDE O. WASHINGTON and AVA B. WASHINGTON,
Petitioners

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division
No. 87-C-140 – **Allen Sharp,** *Judge.*

This matter comes before the court for its consideration upon the following documents:

1. The "MOTION TO STAY" filed herein on April 23, 1987.

2. The "APPLICATION FOR STAY PENDING REVIEW" filed herein on April 28, 1987.

---

*Because of the urgent nature of this petition and the attached motions, this matter was initially ruled on by Chief Judge Bauer and Judge Easterbrook on April 23, 1987, at 4:00 p.m. Rule 27(c), Fed.R.App.P. Judge Cummings has reviewed these materials and concurs with their deposition.

3. The "PETITION FOR WRIT OF MANDAMUS" filed herein on April 17, 1987.

Petitioners have not demonstrated sufficient entitlement to the grant of extraordinary relief. Accordingly,

IT IS ORDERED that the "PETITION FOR WRIT OF MANDAMUS" is DENIED.

IT IS FURTHER ORDERED that the "APPLICATION FOR STAY PENDING REVIEW" and the "PETITION FOR WRIT OF MANDAMUS" are DENIED as moot.

APPENDIX O

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 19, 1988.

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*

No. 88-1873
IN THE MATTER OF:
CLYDE O. WASHINGTON and AVA B. WASHINGTON,
Petitioners

Petition for a Writ of Mandamus
Nos. 87 C 140, 83 C 125 – **William C. Lee**, *Judge.*

This matter comes before the court for its consideration of the "PETITION FOR WRIT OF MANDAMUS" filed herein on May 6, 1988.

Petitioners seek, by way of mandamus, to obtain review for the *third* time of their request that this court consolidate two district court cases which are currently unconsolidated: S87-140 and S83-125. Twice before this court has denied such request on the ground that it does not have jurisdiction to consolidate a district court case in which a final order has been issued with a separate district court case in which no final order has issued. See orders dated April 1, 1988 and April 22, 1988. In addition, on February 23, 1988, this court issued an order which

explained in detail why petitioners' appeal must be limited to a review of the district court's grant of summary judgment in case S83-125. Because no final action has been taken by the district court in case S87-140, there is nothing in that case for this court to review and this court cannot consolidate S87-140 with S83-125. Accordingly,

IT IS ORDERED that said motion is DENIED.

Petitioners' persistence in filing frivolous motions seeking relief which cannot be provided by this court amounts to an abuse of process for which petitioners may be sanctioned. Therefore,

IT IS FURTHER ORDERED that petitioners must seek express leave of this court before filing any further motions, petitions or appeals in this court. In seeking leave to file, petitioners must certify,

1) that the claim or claims they wish to present to this court are new claims never before raised and disposed of on the merits by this court, and

2) that the claim or claims are not frivolous or taken in bad faith.

The motion for leave to file must be captioned "Application Pursuant to Court Order Seeking Leave to File" and must either cite or be accompanied by a copy of today's order. Failure to comply with this order will result in the imposition of monetary sanctions.

APPENDIX P

[UNPUBLISHED ORDER NOT TO BE CITED
PER CIRCUIT RULE 33]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Submitted November 3, 1988*
November 22, 1988.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. DANIEL A MANION, *Circuit Judge*

No. 87-2787
CLYDE O. WASHINGTON and AVA B. WASHINGTON,

Plaintiffs-Appellants,

v.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, et al.,

Defendants-Appellees.

Appeal from the United States District Court,
Northern District of Indiana, South Bend Division.
No. 83 C 125 – **William C. Lee**, *Judge.*

---

* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Rule 34(a), Fed. R. App. P.; Circuit Rule 34(f). Plaintiffs-Appellants have filed such a statement and

(Continued on following page)

ORDER

Clyde O. and Ava B. Washington, proceeding *pro se*, appeal the district court's grant of summary judgment on behalf of defendants and the dismissal of their complaint in its entirety. The Washingtons filed this suit against various individuals alleging essentially three separate causes of action. The first was against First Federal Savings and Loan Association of LaPorte County, Indiana and two of its officers, Orville Anderson and James Pugh, charging them with "conspiracy, racial discrimination and retaliation" for withholding approximately $19.00 in monthly mortgage insurance payments from the proceeds of a loan made to the Washingtons. The second aspect of the Washingtons' complaint charged attorney John Hoehner with malpractice in his representation of the Washingtons in a state court suit. The third and fourth "counts" of the complaint concerned a payment dispute on the Washingtons' Marshall Field's and Company credit account in which a state court judgment was entered against the Washingtons and liens placed against their personal and real property. The defendants in this portion of the suit are Marshall Field's, Eldon Krausch, Tom Naughton, Richard Schaumann, and Creditors Service Bureau Company.

Pursuant to 28 U.S.C. § 636(b)(1)(b), the district court referred this case to a magistrate for findings and recommendations on the defendants' various motions for

---

(Continued from previous page)

request oral argument. Upon consideration of that statement, the briefs, and the record, the request for oral argument is denied and the appeal is submitted on the briefs and record.

dismissal and/or summary judgment.[1] Noting that the Washington's complaint was not a "model of clarity," the magistrate construed each of the three separate claims as attempting to state a cause of action for violations of 42 U.S.C. § 1983. The magistrate then concluded that the complaint did not state a cognizable § 1983 claim as to any of the defendants because it did not demonstrate that any defendant had acted under color of state law, an essential element to such a cause of action. The magistrate also concluded that, with respect to the claim against Marshall Field's and Company and those defendants named in that portion of the suit, the Washingtons' suit was an impermissible attempt to collaterally attack a state court judgment. The magistrate therefore recommended that all of the defendants' motions for summary judgment and/or dismissal be granted. After reviewing the record *de novo*, the district court accepted and approved the magistrate's recommendation.[2] Judgment

---

[1] In their brief, the Washingtons object to the district court's referral of their case to the magistrate, claiming that they did not consent to trial by a magistrate. They misunderstand the nature of a referral pursuant to 28 U.S.C. § 636(b)(1)(c). Pursuant to that section, the referral was for advisory purposes only; the district court was free to adopt, reject or modify the magistrate's report and recommendation. The district court did undertake a *de novo* review of the record, taking into account the Washingtons' objections, prior to approving and adopting the report. Thus, they were not deprived of their right to a final decision in the district court.

[2] Although the district court suggested in its order that the Washingtons may have waived their right to object to the magistrate's report and recommendation by failing to file their

(Continued on following page)

was therefore entered in favor of all defendants and the case dismissed in its entirety. The Washingtons filed a timely notice of appeal.

As we noted in our orders of February 23, April 1, and April 22, 1988 this appeal is limited to those issues raised in and defendants named in the district court's case number 83 C 125, which were the subject of the magistrate's report and recommendation. Any other issues or defendants discussed in the Washingtons' briefs are not properly before the court at this time. As to those issues properly before us, the magistrate's report and recommendation, which was accepted by the district court, correctly disposed of the Washingtons' claims. To the extent that each of their claims can be construed as requesting relief pursuant to 42 U.S.C. § 1983, the absence of any action taken under color of state law precludes the Washingtons from pursuing a § 1983 claim against any of these defendants. Thus, to the extent that these claims are brought under § 1983, we affirm the judgment of the district court for the reasons stated in the magistrate's thoughtful and thorough report and recommendation.[3]

To that reasoning, we wish to add only the following regarding the Washingtons' claim against First Federal

---

(Continued from previous page)

objections within the prescribed time period, our review of the record indicates that the Washingtons' objections were timely filed. Thus, we do not address the issue of waiver.

[3] The magistrate also concluded that the suit against Marshall Field's and others was nothing more than an impermissible attempt to collaterally attack a final judgment of a state court. We agree.

Savings and Loan and its officers. The allegation that the bank's charging them approximately $19.00 for monthly mortgage insurance payments was racial discrimination could also be construed as a claim under 42 U.S.C. § 1981, in which case there is no state action requirement. *Runyon v. Crary*, 427 U.S. 160 (1976). Nonetheless, § 1981 does have a discriminatory intent requirement which cannot be established by conclusory allegations of generalized racial bias. *Minority Police Officers Ass'n v. City of South Bend*, 801 F.2d 964, 967 (7th Cir. 1986). A § 1981 plaintiff must allege some facts which support an inference that the defendants' actions were motivated by racial discrimination; the fact that the plaintiffs are black is, standing alone, insufficient to raise such an inference. *Lowe v. Lotsinger*, 772 F.2d 308, 311 (7th Cir. 1985). All that the Washingtons claim is that the bank charged them $19 per month for mortgage insurance. As the magistrate found, the loan agreement entered into between the bank and the Washingtons provided for such a charge. The Washingtons have not alleged or suggested that similarly situated white mortgagors at this bank were not required to purchase mortgage insurance or that they were able to purchase it at a lower rate. The Washingtons simply have not alleged any facts that would lead to an inference of racial discrimination. Therefore, even if we construe this portion of the complaint as arising under § 1981, the defendants were nonetheless entitled to summary judgment on this claim.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

APPENDIX Q

JUDGMENT – WITHOUT ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 22, 1988.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. DANIEL A MANION, *Circuit Judge*

No. 87-2787
CLYDE O. WASHINGTON and AVA B. WASHINGTON,

Plaintiffs-Appellants,

v.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, et al.,

Defendants-Appellees.

Appeal from the United States District Court,
for the Northern District of Indiana, South Bend Division.
No. 83 C 125 – **William C. Lee**, Judge.

This cause came before the Court for decision on the record from the United States District Court for the Northern District of Indiana, South Bend Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the

same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

United States Court of Appeals
For The Seventh Circuit
Thomas F. Strubble **219 South Dearborn Street**
Clerk **Chicago, Illinois 60604**
312-435-5850

Office of the Clerk
102 Federal Building
204 South Main Street
South Bend, Indiana 46601

Date: December 14, 1988

Re: *CLYDE O. WASHINGTON, et al., Plaintiffs-Appellants*

vs.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, et al., Defendants-Appellees

U.S.C.A.-7 No. 87-2787 District Court No. 83 C 125
Judge William C. Lee

Dear Clerk:

Herewith is the mandate of this Court in the above-entitled appeal. "A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate." (F.R.A.P. 41(a)). I am also returning the original record of your District Court, which was transmitted to this office for use on appeal. Please acknowledge receipt on the enclosed copy of this letter.

Contents of Record being Returned:
1 Vol. Pleadings

Contents of Record to be Returned Later:

/s/ Mabel L. Baber
U.S.C.A. Deputy Clerk

. . . . . .

Received above mandate and record from the Clerk of the United States Court of Appeals for the Seventh Circuit.

Date: _____ _____

Clerk of District Court

Copies Mailed to:
Clyde O. Washington, 203 Westwind Drive, P.O.Box 8834, Michigan City, Indiana 46360
C. T. Kitowski, 720 Franklin Square, Michigan City, Indiana 46360
David J. Hanson, 8396 Mississippi Street, Merrillville, Indiana 46410
Atley C. Price, 3021 East Michigan Boulevard, Michigan City, Indiana 46360
James G. Richmond, Office of United States Attorney, 507 State Street, Hammond, Indiana
Clifford D. Johnson, Office of United States Attorney, 204 South Main Street South Bend, Indiana 46601-2191

NOTE TO COUNSEL:
If any physical and large documentary exhibits have been filed in the above-entitled cause, they are to be withdrawn ten days from the date of this notice. Exhibits not withdrawn during this period will be disposed of.

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
219 So. Dearborn Street
Chicago, Illinois 60604

Taxed in favor of: JOHN F. HOEHNER, Defendant-Appelle

BILL OF COSTS

CLYDE O. WASHINGTON, et al., Plaintiffs-Appellants

In Cause No. 87-2787

vs.

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION, etc., et al, Defendants-Appellees

	COST OF EACH ITEM		
1. For Docketing a case on appeal or review or docketing any other proceeding	$65.00		
2. For Making a typed copy of any record or paper, per page	2.00		
For Comparing with the original thereof any copy of any transcript of record, entry, record or paper, when such copy is furnished by the person requesting the certification, per page	2.00		
For Certification of any document or paper, whether the certification is made directly on the document, or by separate instrument	2.00		
For a photographic reproduction of any record or paper, per page	.50		
3. For every search of the records of the court and certifying the result of same	2.00		
4. Charge for copy of an opinion of the court	2.00		
5. Reproduction of Brief		$350	25
6.			
Total		$350	25

A-50

APPENDIX R

IN THE LAPORTE SUPERIOR COURT NO.1

1987 TERM

STATE OF INDIANA)
) SS:
COUNTY OF LAPORTE)

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LAPORTE COUNTY,
Plaintiff

v.

CLYDE O. WASHINGTON and AVA B. WASHINGTON, husband and wife,
Defendants

CAUSE NO. 44576

PETITION FOR WRIT OF ASSISTANCE
(Filed FEB 11 1987)

Plaintiff herein, First Federal Savings and Loan Association of LaPorte County, shows the Court that it had recovered a judgment and decree of foreclosure in the above-entitled cause against the defendants, Clyde O. Washington and Ava B. Washington, husband and wife, and that it was the successful bidder at a public Sheriff's Sale held on the 20th day of January, 1987, for the improved real estate commonly known as 342 Crestwood Drive, Michigan City, Indiana, and more particularly described as follows, to-wit:

> Lot 20 in Block 4, in Southgate First Addition to Michigan City, which is recorded in Plat Book 11 page 49, in the Office of the Recorder of LaPorte County, Indiana.

That the defendants and others are still in possession of said real estate and further refuse to surrender said premises to the plaintiff.

WHEREFORE, plaintiff asks the Court for a writ of assistance to recover possession of said real estate and for all other just and proper relief.

/s/ C. T. Kitowski
C. T. Kitowski
Attorney for Plaintiff
720 Franklin Square
Michigan City, IN 46360
(219) 872-0638

I HEREBY CERTIFY THE
WITHIN TO BE A TRUE COPY
OF THE ORIGINAL WRIT.
KENNETH E. LAYTON, SHERIFF

By Helen Sovanich Deputy

APPENDIX S

IN THE LAPORTE SUPERIOR COURT NO.1

1987 TERM

STATE OF INDIANA	)	
	) SS:	
COUNTY OF LAPORTE	)	
FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LAPORTE COUNTY, Plaintiff	)	
v.	)	CAUSE NO. 44576
CLYDE O. WASHINGTON and AVA B. WASHINGTON, husband and wife, Defendants	)	

WRIT OF ASSISTANCE

TO THE SHERIFF OF LAPORTE COUNTY, INDIANA:

WHEREAS, Plaintiff, First Federal Savings and Loan Association of LaPorte County, recovered a judgment and decree of foreclosure in the above-entitled cause of action, and that it was the successful bidder at a public auction held on the 20th day of January, 1987, for improved real estate commonly known as 342 Crestwood Drive, Michigan City, Indiana, and more particularly described as follows, to-wit:

> Lot 20, in Block 4, in Southgate First Addition to Michigan City, which is recorded in Plat Book 11 page 49, in the Office of the Recorder of LaPorte County, Indiana;

and

WHEREAS, the defendants and others are still in possession of said real estate and refuse to surrender same to plaintiff.

YOU ARE THEREFORE HEREBY COMMANDED to enter upon and deliver possession of said real estate to First Federal Savings and Loan Association of LaPorte County, the plaintiff herein.

YOU ARE FURTHER ORDERED to make do return of this writ within ten (10) days from the date hereof.

DATED this 11th day of February, 1987.

/s/ Donald D. Martin
Donald D. Martin, Judge
LaPorte Superior Court No. 1

I HEREBY CERTIFY THE
WITHIN TO BE A TRUE COPY
OF THE ORIGINAL WRIT.
KENNETH E. LAYTON, SHERIFF

By Helen Sovanich Deputy

If you are not out within 30 days
of service – we will have to move you.

APPENDIX T

IN THE LAPORTE SUPERIOR COURT NO.1

1987 TERM

STATE OF INDIANA)
) SS:
COUNTY OF LAPORTE)

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LAPORTE COUNTY,
Plaintiff

v.

CLYDE O. WASHINGTON and AVA B. WASHINGTON, husband and wife,
Defendants

CAUSE NO. 44576

WRIT OF ASSISTANCE

TO THE SHERIFF OF LAPORTE COUNTY, INDIANA:

WHEREAS, Plaintiff, First Federal Savings and Loan Association of LaPorte County, recovered a judgment and decree of foreclosure in the above-entitled cause of action, and that it was the successful bidder at a public auction held on the 20th day of January, 1987, for improved real estate commonly known as 342 Crestwood Drive, Michigan City, Indiana, and more particularly described as follows, to-wit:

> Lot 20, in Block 4, in Southgate First Addition to Michigan City, which is recorded in Plat Book 11 page 49, in the Office of the Recorder of LaPorte County, Indiana;

and

WHEREAS, the defendants and others are still in possession of said real estate and refuse to surrender same to plaintiff.

YOU ARE THEREFORE HEREBY COMMANDED to enter upon and deliver possession of said real estate to First Federal Savings and Loan Association of LaPorte County, the plaintiff herein.

YOU ARE FURTHER ORDERED to make do return of this writ within ten (10) days from the date hereof.

DATED this 11th day of February, 1987.

/s/ Donald D. Martin
Donald D. Martin, Judge
LaPorte Superior Court No. 1

I HEREBY CERTIFY THE
WITHIN TO BE A TRUE COPY
OF THE ORIGINAL WRIT.
KENNETH E. LAYTON, SHERIFF

By Helen Sovanich Deputy

The Sheriffs department will be at your home on the 29th of April 1987, to suprise your eviction at 8:00 A.M.

APPENDIX U

RETURN TO

C.O.&A. WASHINGTON
P.O. BOX 88834
MICHIGAN CITY, IN. 46360

Print Sender's name, address, and ZIP Code in the space below

P-576 600 468

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Orville L. Anderson
LaPorte Fed SAVNG & LOAN
Street and No. COUNTY
4 ST. & PINE STREET
P.O. State and ZIP Code
MICHIGAN CITY, IN. 46360

Postage	209
Certified Fee	75
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt showing to whom and Date Delivered	70
Return Receipt showing to whom, Date, and Address of Delivery	
TOTAL	354

CHICAGO, IL LOOP STA APR 23 1987 USPO

PS Form 3800, June 1985

U.S.G.P.O. 153-506

SENDER: Complete items 1 and 2 when additional services are desired, and complete items 3 and 4.

Put your address in the "RETURN TO" space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for additional service(s) requested.

1. ☐ Show to whom delivered, date, and addressee's address. 2. ☐ Restricted Delivery.

3. Article Addressed to: Orville L. Anderson
~~1st~~ First Fed. of LaPorte County.
4th and Pine Streets
MICHIGAN CITY, IN. 46360

4. Article Number
P 576 600 468

Type of Service:
☐ Registered ☒ Certified ☐ Express Mail ☐ Insured ☐ COD

Always obtain signature of addressee or agent and DATE DELIVERED.

5. Signature – Addressee
X

6. Signature – Agent
X Emil Schultz

7. Date of Delivery
APR 21 1987

8. Addressee's Address *(ONLY if requested and fee paid)*

PS Form 3811, Feb. 1986 DOMESTIC RETURN RECEIPT

A-58

RETURN TO

C.O.& A. WASHINGTON
P.O. BOX 8834
MICHIGAN CITY, IN. 46360

Print Sender's name, address, and ZIP Code in the space below.

P-576 600 470

RECEIPT FOR CERTIFIED MAIL
NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL
(See Reverse)

KENNETH E. LAYTON
SHERIFF OF LAPORTE COUNTY.
COURT HOUSE
WASHINGTON & MICHIGAN BLVD
MICHIGAN CITY, IN. 46360

Postage	$ 209
Certified Fee	75
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt showing to whom and Date Delivered	70
Return Receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	354

CHICAGO, IL LOOP ST
APR 23 1987

PS Form 3800, June 1985

U.S.G.P.O. 153-506

SENDER: Complete items 1 and 2 when additional services are desired, and complete items 3 and 4.

Put your address in the "RETURN TO" space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for additional service(s) requested.

1. ☐ Show to whom delivered, date, and addressee's address. 2. ☐ Restricted Delivery.

3. Article Addressed to:
KENNETH E. LAYTON
SHERIFF OF LAPORTE COUNTY,
COURT HOUSE
WASHINGTON & MICHIGAN BLVD,
MICHIGAN CITY. IN. 46360

4. Article Number
576600470

Type of Service:
☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail

Always obtain signature of addressee or agent and DATE DELIVERED.

5. Signature – Addressee
X

6. Signature – Agent
X Helen Sarosnick

7. Date of Delivery
4-27-87

8. Addressee's Address *(ONLY if requested and fee paid)*

PS Form 3811, Feb. 1986 **DOMESTIC RETURN RECEIPT**

RETURN TO

C.O.&A. WASHINGTON
P.O. BOX 8834
MICHIGAN CITY, IN. 46360

Print Sender's name, address, and ZIP Code in the space below

P-576 600 469

RECEIPT FOR CERTIFIED MAIL
NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL
(See Reverse)

Sent to Judge Donald D. MARTIN	
Street and No. Washington St & Mich. Blvd	
P.O., State and ZIP Code Michigan City, IN. 46360	
Postage	$ 209
Certified Fee	75
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt showing to whom and Date Delivered	70
Return Receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	$ 354

U.S.G.P.O. 153-566

PS Form 3800, June 1985

CHICAGO, IL LOOP STA APR 23 1987 USPO

● SENDER: Complete items 1 and 2 when additional services are desired, and complete items 3 and 4.

Put your address in the "RETURN TO" space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for additional service(s) requested.

1. ☐ Show to whom delivered, date, and addressee's address. 2. ☐ Restricted Delivery.

3. Article Addressed to: Honorable. Judge Donald D. MARTIN LAPORTE COUNTY SUPERIOR COURT Washington St. & Michigan Blvd MICHIGAN CITY, IN. 46360

4. Article Number 576 600 469

Type of Service:
☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail

Always obtain signature of addressee or agent and DATE DELIVERED.

5. Signature – Addressee
X [signature]

6. Signature – Agent
X

7. Date of Delivery
4-27-87

8. Addressee's Address (ONLY if requested and fee paid)

PS Form 3811, Feb. 1986 DOMESTIC RETURN RECEIPT

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF INDIANA
SOUTH BEND DIVISION

STATE OF INDIANA)
) SS:
COUNTY OF ST. JOSEPH)

CLYDE O. WASHINGTON)
AND)
AVA B. WASHINGTON)
)
PLAINTIFFS,)
)
VS.)
)
FIRST FEDERAL OF)
LAPORTE COUNTY, et al.,) CIVIL NO.
) S87-00140
MARSHALL FIELD AND)
COMPANY; et al.,)
)
FEDERAL HOME LOAN BANK)
BOARD, et al.,)
)
NATIONAL CREDIT UNION)
ADMINISTRATION et al.,)
)
CREDITORS BUREAU SERVICES,)
INC., et al.,)
)
BETHLEHEM EMPLOYEES)
FEDERAL CREDIT UNION, et al.,)
)
DONALD D. MARTIN, JUDGE)
LAPORTE SUPERIOR COURT 1,)
)
DOUGLAS M. GRIMES)
ATTORNEY AT LAW)
)
DEFENDANTS.)

APPLICATION FOR EMERGENCY WRIT OF PROHIBITION TO ISSUE

(Filed MAR 9 1987)

This original Action of petitioners, Clyde O. Washington and Ava B. Washington. Petitioner, Ava B. Washington pro se; had in this Cause No. 44576, in the LaPorte Superior Court No. 1.

For an **Emergency Writ of Prohibition To Issue,** to Kenneth E. Layton, Sheriff of LaPorte County, comes before the United States District Court, for the Northern District of Indiana on the petitioners-application for a Writ of Prohibition.

States:

1. That a trial (hearing) had in the LaPorte Superior Court Number One, Donald D. Martin, said Judge thereof, was held in violation of petitioners, Clyde O. Washington and Ava B. Washington (their) Constitutional Rights under the 7th and 14th amendment to the U.S. Constitution as well as the Civil Rights Act, 42 U.S.C. 1983.

2. The Indiana Rules of Court, Rule of Trial Procedure: VI. Trials, Trial Rule 38. Jury Trial of Right. Trial Rule 75. X. Venue, Change of Venue, Change of Judge. Trial Rule 76. Change of Venue.

3. I am a layman without a formal educational background, and without any law school training, and that appellant petitioner Ava B. Washington is pro se; by design, and not by choice.

The Honorable Donald D. Martin, of the LaPorte Superior Court No. 1 violated his oath of office, of to see that Justice is done, and to uphold THE LAW. On October 2, 1986 by the order of permitting Relators-Defendants, **paid Attorney Douglas M. Grimes, of Gary, Indiana to Withdraw – *period*, without a legal excuse.**

NOTICE AND DEMAND

TO: Kenneth E. Layton, Sheriff Department, of LaPorte County, Moving Company, Name Unknow-N and all personnel & employees thereof:

NOTICE IS HEREBY GIVEN TO YOU AND EACH OF YOU that if you proceed to remove property **and the family** of Clyde O. Washington from their home at 342 Crestwood Drive in the city of Michigan City, Indiana, that you will be a party to the violation of their constitutional rights under the 7th and 13th Amendment to the U.S. Constitution as well as Indiana **RULES OF COURT, RULES OF TRIAL PROCEDURE; VI. TRIALS; TRIAL RULE 38; JURY TRIAL OF RIGHT/(B) DEMAND; (C)**

Same: Specification of Issues.

PLEASE TAKE NOTICE that there is a lawsuit in this case which has not been brought to trial; pending in **THE UNITED STATES DISTRICT COURT; DISTRICT FOR THE NORTHERN DISTRICT OF INDIANA JURY DEMANDED; CIVIL NO. S 83-125; same complaint-same mortgage/note contract on microfilm record as instrument No. 81-09456;** of which **RELATORS-DEFENDANTS,** made it known in the **LAPORTE SUPERIOR COURT NO. 1** the Honorable Donald D. Martin, as

Judge Thereof, in writing/written **(MOTION TO DISMISS), October 1985,** of which **The LaPorte Superior Court No. 1 Judge Martin, never responded; cause No. 44576; 1985 term. Defendants** in this have demanded a trial by jury.

The defendants who are adverse parties in possession of the following Real Estate property to Wit:

> **Lot 20** in Block 4 in Southgate First Addition to Michigan City, which is recorded in Plat Book II page 49, in the Office of the Recorder of LaPorte County, Indiana.

Plaintiff-Defendants Clyde O. Washington and Ava B. Washington have filed a suit in **U.S. District Court, Civil No. S 83-125, on March 24, 1983, now pending in court at the Northern District of Indiana, Fort Wayne, Indiana.** A suit at common law per the 7th Amendment of the **U.S. Constitution** which says:

> **ARTICLE VII., AMENDMENT VII [1791]** "in Suits at Common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the Common law."

PLEASE TAKE NOTICE that the Defendants in **CAUSE NO. 44576,** demand **Written Motion** December 5, 1985, for **(Change of Venue/Trial by Jury by Defendant Ava B. Washington pro se),** and again at **(Trial on July 7, 1986, Defendants represented by Counsel Douglas M. Grimes, Gary, Indiana, on July 7, 1986 Stated to the Court:**

> **Quoting I am reserving the Motion made by Mrs. Washington, Change of Venue, Trial by Jury.**

(transcribed/transcript recorded material), the LaPorte Superior Court No. 1, the Honorable Donald D. Martin, as Judge thereof; (HAS NEVER RESPONDED). And that the Defendants will amend their complaint and sue Judge Donald D. Martin, and Attorney C.T. Kitowski, if Clyde O. Washington and Ava B. Washington is evicted from their (Homestead), without due process, and that all appeals have been exhausted in CAUSE NUMBER 44576, in the Aforemention Court. Judge Donald D. Martin, has violated his oath of office and the constitutional rights of the Defendants Clyde O. Washington and Ava B. Washington. Also the Defendants will amend their complaint and sue Attorney C.T. Kitowski, for the First Federal of LaPorte County, of perjury, (material evidence).

PLEASE TAKE NOTICE, that if you are a party to denying the undersigneds property without due process of law, that each and everyone of you will be violating the following Federal Statutes and you will be **LIABLE** TO Clyde O. Washington and Ava B. Washington, family for civil damages.

THE FOLLOWING FEDERAL STATUTES WILL BE VIOLATED IF YOU REMOVE PERSONS OR PROPERTY FROM 342 Crestwood Drive Southgate Michigan City, Indiana. The Statutes you will be violating are as follows:

1. Title 42, U.S.C. 1983 et seq.
2. Title 18, Sec. 241 and 242.

TITLE 42, U.S.C. Section 1983 reads: "EVERY PERSON WHO, UNDER COLOR OF ANY STATUTE, ORDINANCE, REGULATION, CUSTOM OR USAGE, OF ANY STATE, SUBJECTS OR CAUSES TO BE SUBJECTED, ANY CITIZEN OF THE UNITED STATES OR OTHER PERSON WITHIN THE JURISDICTION THEREOF TO THE DEPRIVATION OF ANY RIGHTS, PRIVILEGES, OR IMMUNITIES SECURED BY THE CONSTITUTION AND LAWS, **SHALL BE LIABLE TO THE PARTY INJURED** IN A CIVIL ACTION AT LAW, SUIT IN EQUITY, OR OTHER PROPER PROCEEDING FOR REDRESS."

TITLE 42, U.S.C. 1986 reads: "EVERY PERSON WHO, **HAVING KNOWLEDGE** THAT ANY OF THE WRONGS CONSPIRED TO BE DONE, AND MENTIONED IN THE PRECEDING SECTION (42 USCS 1985), ARE ABOUT TO BE COMMITTED, AND HAVING POWER TO PREVENT OR AID IN PREVENTING THE COMMISSION OF THE SAME, NEGLECTS OR REFUSES SO TO DO, IF SUCH WRONGFUL ACTS BE COMMITTED, **SHALL BE LIABLE TO THE PARTY INJURED** . . . "

TITLE 18, SECTION 241 reads: "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . . They shall be fined not more than $10,000 or imprisoned not more than ten years or both."

UNDER STATE STATUTES, A JUDGE WHO IS SUED AND IS A PARTY TO A CASE MUST REMOVE HIMSELF FROM THE CASE AND THE CLERK OF COURTS HAS NO JUDICIAL POWERS.

ANY WRIT OF ASSISTANCE THAT YOU MAY HAVE IN YOUR POSSESSION IS UNLAWFUL AND ANY ACTIONS TO CARRY OUT AN UNLAWFUL WRIT SHALL CAUSE YOU TO BE IN VIOLATION OF THE ABOVE DESCRIBED STATUTES. SINCE EACH OF YOU HAVE TAKEN AN OATH TO UPHOLD THE CONSTITUTION OF THE UNITED STATES, YOU MAY FURTHER BE FOUND IN VIOLATION OF 18 U.S. Code 1001 and Title 18, Sec. 1621.

DATE: March 5, 1984

Supreme Court, U.S.
FILED
APR 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1570

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CLYDE O. WASHINGTON and AVA B. WASHINGTON,

Petitioners,

vs.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LAPORTE COUNTY, MARSHALL FIELD & COMPANY, CREDITORS SERVICE OF MICHIGAN CITY, INDIANA, ORVILLE ANDERSON, JAMES PUGH, ELDON KRAUSCH, TOM NAUGHTON, RICHARD SCHAUMANN, JOHN F. HOEHNER,

Respondents.

BRIEF OF RESPONDENT JOHN F. HOEHNER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STEVEN A. JOHNSON *
PAUL B. PORACKY
SPANGLER, JENNINGS, SPANGLER & DOUGHERTY, P.C.
8396 Mississippi Street
Merrillville, Indiana 46410
(219) 769-2323

Attorneys for Respondent, John F. Hoehner

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED

Whether in a 42 U.S.C. §1983 action, when facing a Motion to Dismiss, a pro se plaintiff is required to show specific acts or conduct committed under color of state law by a private attorney in a state court case which resulted in deprivation of rights and privileges secured by the Constitution, before a valid claim is stated.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	6
ARGUMENT	7
I. ONLY A CLAIM FOR ATTORNEY MALPRACTICE IS BEFORE THE COURT, AND AS A RESULT OF PLAINTIFFS' FAILURE TO SHOW THAT JOHN HOEHNER ACTED UNDER COLOR OF STATE LAW, THEIR PETITION MUST BE DENIED	7
II. THE FAILURE TO SHOW SPECIFIC ACTS BY JOHN HOEHNER DONE UNDER COLOR OF STATE LAW WITHIN THE PURVIEW OF SECTION 1983 DISPENSES WITH THE NECESSITY TO INQUIRE INTO ALLEGATIONS OF CONSTITUTIONAL DEPRIVATION UNDER THE SEVENTH AND FOURTEENTH AMENDMENTS	10
CONCLUSION	11

TABLE OF AUTHORITIES

Cases	PAGE
Briscoe v. LaHue, 460 U.S. 325, 103 S.Ct. 1108 (1983)	7, 8
Civil Rights Cases, 109 U.S. 3, 33 S.Ct. 18 (1883)	7
Coleman v. Frantz, 754 F.2d 719 (7th Cir. 1985)	7
Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed. 2d 80 (1957)	9
Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652, *rehrg. denied*, 405 U.S. 948, 92 S.Ct. 963, 30 L.Ed.2d 814 (1972)	9
Henderson v. Fisher, 631 F.2d 1115 (3rd Cir. 1980)	8
Kosak v. United States, 465 U.S. 848, 104 S.Ct. 1519 (1984)	3
Masel v. Industrial Commission of Illinois, 541 F. Supp. 342 (N.D. Ill. 1982)	8
Miller v. Duffin, 637 F.Supp. 496 (N.D. Ind.), *aff'd*, 812 F.2d 1410 (1986)	8
Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908 (1981)	7, 10
Polk County v. Dodson, 454 U.S. 312, 102 S.Ct. 445 (1981)	8
Rendell-Baker v. Kohn, 102 S.Ct. 2764 (1982)	7

Other Authorities	
28 U.S.C. §1254(1)	2
42 U.S.C. §1983 (1982)	*passim*
Indiana Rules of Trial Procedure, Rule 59(c)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CLYDE O. WASHINGTON and AVA B. WASHINGTON,

Petitioners,

vs.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LAPORTE COUNTY, MARSHALL FIELD & COMPANY, CREDITORS SERVICE OF MICHIGAN CITY, INDIANA, ORVILLE ANDERSON, JAMES PUGH, ELDON KRAUSCH, TOM NAUGHTON, RICHARD SCHAUMANN, JOHN F. HOEHNER,

Respondents.

BRIEF OF RESPONDENT JOHN F. HOEHNER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The opinions and orders of the lower courts, except for the United States Magistrate's Order of August 14, 1987, are attached to the Petition. The United States Magistrate's Order is included in the Respondent's Appendix section. (App. A, *infra*). None of the Orders are reported.

JURISDICTION

The jurisdictional requisites are not adequately set forth in the Petition. The Order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Indiana, South Bend Division, was entered on November 22, 1988. No Petition for Rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 1983 of the Civil Rights Act of 1964, 42 U.S.C. §1983 (1982) provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding or redress.

STATEMENT OF THE CASE

The petitioners, Clyde O. Washington and Ava B. Washington (Washingtons), brought this action against various individuals, corporations and entities alleging essentially three (3) separate causes of action under the Civil Rights Act of 1964, 42 U.S.C. §1983.[1] The first cause of action was against First Federal Savings & Loan Association of LaPorte County, Indiana and two of its officers, Orville Anderson and James Pugh, charging them with "conspiracy, racial discrimination and retaliation" for withholding approximately Nineteen and no/100 Dollars ($19.00) in monthly private mortgage insurance payments from the proceeds of a mortgage loan made to the Washingtons. The second cause of action charged John Hoehner with malpractice, conspiracy and deprivation of due process rights in his representation of the Washingtons in a state court suit.[2] A third cause of action which involved Mar-

[1] This Brief in Opposition to the Petition for Writ of Certiorari concerns only the respondent, John F. Hoehner in his role as a private attorney. Other factual information supplied in the Statement of the Case with regards to other individuals, corporations and entities is merely for purposes of establishing continuity. Additionally, the petitioners' contention that the present matter (filed in 1983) should be consolidated with their later lawsuit (filed in 1987) which is still pending in the United States District Court for the Northern District of Indiana, South Bend Division, wherein John Hoehner is not a named party, is without merit having already been addressed by the United States Court of Appeals for the Seventh Circuit in Orders dated February 23, April 1, April 22, and May 19, 1988.

[2] Owing to the Washingtons' failure to have properly raised and preserved the question of conspiracy at the appellate level, only the issue of alleged malpractice is before the Court. As stated in *Kosak v. United States*, 465 U.S. 848, 104 S.Ct. 1519 n. 3 (1984), this Court will refrain from addressing issues not raised in the Court of Appeals.

shall Field & Company, Creditors Service of Michigan City, Eldon Krausch, Tom Naughton, and Richard Schaumann concerned a state court judgment entered against the Washingtons and subsequent liens placed against their personal and real property.

On December 23, 1981, the Washingtons called on the law offices of John Hoehner to discuss available legal alternatives resulting from an Indiana State Court judgment in favor of Marshall Field & Company and its assignee, Creditors Service of Michigan City. Judgment was entered against the Washingtons on June 12, 1980 in the LaPorte County (Indiana) state court, for failure to pay outstanding bills and charges. (R. 1, p. 2; R. 73, p. 6).[3] Up until the December 31, 1981 meeting, the Washingtons had been conducting their own defense as pro se defendants. At the meeting John Hoehner requested all relevant documents regarding credit charges incurred at Marshall Field's to aid him in his negotiations, since a Motion for Proceedings Supplemental to Execution on the Judgment was already on file in the state court. It was also pointed out to the Washingtons that the time for direct

[3] Judgment in the state court was entered in favor of Marshall Field & Company and its assignee, Creditors Service of Michigan City and against the Washingtons, who represented themselves as pro se defendants on June 12, 1980 for a long outstanding unpaid credit balance. (R. 19, Exh. B). The Washingtons did not consult with Attorney Hoehner until December 23, 1981 some one and one-half years after judgment was entered. Under applicable Indiana law, the time for appealing the LaPorte County Court judgment had long since expired. The first step in preserving rights to an appeal is to file a Motion to Correct Errors with the trial court within sixty (60) days after entry of a final judgment. Indiana Rules of Trial Procedure, Rule 59(c). *See* Brief of defendant-appellee, John F. Hoehner, Appendix A-27. This time period expired on August 12, 1980, some eighteen (18) months prior to the Washingtons meeting with John Hoehner.

legal action by an attorney was no longer feasible given the lapse of time since the date of judgment, as the Indiana Rules of Trial Procedure did not provide a mechanism for appealing the state court judgment under this given time frame.

As a result of this meeting a retainer of Three Hundred and Fifty Dollars ($350.00) was paid to John Hoehner to either negotiate and reduce the judgment balance directly with Creditors Service of Michigan City, or to negotiate and enter into an agreement whereby any outstanding interest on the principal balance would be forgiven and payment terms arrived at. (R. 69; R. 70). Negotiations then commenced.

On July 1, 1982, negotiations having failed, Creditors Service of Michigan City filed its Verified Motion on Proceedings Supplemental and the LaPorte County Court scheduled a hearing for the 11th day of August, 1982. This hearing date was later continued by the state court *sua sponte* to September 15, 1982. On July 13, 1982, John Hoehner sent a letter to the Washingtons informing them of his then recent appointment as an Assistant United States Attorney for the Northern District of Indiana, and that effective July 23, 1982, he would no longer be engaged in the private practice of law. (App. B, *infra*). In this same letter, John Hoehner recommended his brother, who was also a licensed attorney in the State of Indiana, to take over their case, but it was also stated that the Washingtons were free to retain any attorney of their choosing. The Washingtons chose neither course offered to them. As the state court docket sheet clearly shows, there was no scheduled court proceeding filed from December 10, 1981 through the time when the attorney/client relationship was terminated. (App. C, *infra*).

SUMMARY OF THE ARGUMENT

At no time during the entire pendency of this case have the Petitioners pointed to any specific events, facts, conduct or actions by John Hoehner that even hint at his having acted under color of state law during the time period he represented the Washingtons as a private attorney. The representation of a client by an attorney is a private function for which state office and authority are not required. Owing to this factor, it is well established that a private attorney does not act under color of state law for purposes of Section 1983 merely because he practices in state court.

John Hoehner provided legal services to the Petitioners stemming out of and well after a state court judgment was entered against them some eighteen (18) months prior to the parties' first meeting. At all times, this professional relationship was of a private nature. As a result, John Hoehner at no time acted under color of state law as defined by Section 1983, and the Petitioners have failed to raise any facts establishing conduct to the contrary. Thus, the Petition for Writ of Certiorari has no foundation upon which to rest, and should be denied.

ARGUMENT

I.

ONLY A CLAIM FOR ATTORNEY MALPRACTICE IS BEFORE THE COURT, AND AS A RESULT OF PLAINTIFFS' FAILURE TO SHOW THAT JOHN HOEHNER ACTED UNDER COLOR OF STATE LAW, THEIR PETITION MUST BE DENIED.

At issue is the Washingtons' claim under 42 U.S.C. §1983 that John Hoehner committed attorney malpractice and in so doing, acted under color of state law during the course of his representation as a private attorney. The preliminary inquiry in any civil rights action under Section 1983 is whether the conduct complained of was committed by a person under color of state law, and whether the conduct deprived that party of rights, privileges or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1912 (1981); *Coleman v. Frantz*, 754 F.2d 719 (7th Cir. 1985). Section 1983 does not create a remedy for all conduct that may result in violation of rights, privileges or immunities secured by the Constitution and laws. *Briscoe v. LaHue*, 460 U.S. 325, 327, 103 S.Ct. 1108, 1112 (1983). Congress enacted this statute to enforce rights granted under the Fourteenth Amendment which in turn applies to acts done by the state, and not those done by private parties or entities. *Civil Rights Cases*, 109 U.S. 3, 33 S.Ct. 18 (1883); *Rendell-Baker v. Kohn*, 102 S.Ct. 2764, 2770 (1982).

It is well established that representation of a client by an attorney is essentially a private function for which state office and authority are not needed, and to which the requirement of acting under color of state law will

not attach. *Polk County v. Dodson*, 454 U.S. 312, 319, 102 S.Ct. 445, 450 (1981). Privately retained attorneys do not act under color of state law for purposes of a civil rights statute merely because they practice in state court. *Miller v. Duffin*, 637 F.Supp. 496 (N.D. Ind.), *aff'd*, 812 F.2d 1410 (1986). In fact, the process of licensing attorneys as officers of a particular court does not cause a lawyer representing a client in a legal proceeding to be considered to be acting under color of state law for purposes of a Section 1983 action. *Henderson v. Fisher*, 631 F.2d 1115 (3rd Cir. 1980); *Masel v. Industrial Commission of Illinois*, 541 F.Supp. 342 (N.D. Ill. 1982).

The only logical conclusion that can be drawn is that an attorney representing a party in legal proceedings in state court cannot act under color of state law within the meaning of Section 1983. The very nature of the services provided by John Hoehner to the Washingtons points to the private nature of their relationship, and provides ample proof that at no time was he acting under color of state law. *Briscoe v. LaHue*, 460 U.S. 325, 329, n. 6, 103 S.Ct. 1108 (1983).

In their Petition, the Washingtons, as they did in their Complaint and Brief to the United States Court of Appeals for the Seventh Circuit, engage in unfocused conclusory allegations of John Hoehner's failure to represent them in the state court case. The alleged malpractice consisted of the respondents having failed to appear at three (3) court proceedings which resulted in a judgment against them. (R. 75, p. 3). Nevertheless, as shown by the LaPorte County Court docket sheet, judgment had been entered against the Washingtons on June 12, 1980. John Hoehner was not contacted by the Washingtons until December 23, 1981. A hearing date on Proceedings Supplemental to Execution on the Judgment was facing the Washingtons on

December 30, 1981. John Hoehner was able to get a continuance of this hearing so as to engage in direct negotiations with Creditors Service of Michigan City. The actual hearing date on the Verified Motion for Proceedings Supplemental did not take place until September 15, 1982, some two months after John Hoehner informed the Washingtons he could no longer represent them. Thus, during the operative time periods of his representation of the Washingtons, no court hearing of any kind was ever held that bound the Petitioners.

A party's burden of proof in a Section 1983 action must be more than self-serving unfounded conclusions brought forth by a Petitioner. Absent a showing of specific facts or conduct demonstrating that John Hoehner acted under color of state law during his representation of the Washingtons, the issue of whether the Complaint or the instant Petition alleges a Constitutional deprivation of rights need not even be addressed.

It is true that a pro se complaint must be judged by standards less stringent than if the complaint had been drafted by counsel. *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652, *rehrg. denied*, 405 U.S. 948, 92 S.Ct. 963, 30 L.Ed.2d 814 (1972). The Petitioners' original Complaint was challenged by two (2) separate Motions to Dismiss filed by John Hoehner. This Court established a guide for gauging the sufficiency of a complaint in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) when it stated that a complaint should not be held insufficient to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of the claim entitling him to relief. In the present matter, the Petition, as with all the preceding pleadings and briefs filed by the Washingtons, even liberally construed, shows only the same repetitive conclusory allega-

tions. Conclusory allegations of constitutional deprivation of rights by the Washingtons, without anything more, is not sufficient to survive John Hoehner's Motions to Dismiss. There is nothing contained in the Petition that even remotely establishes or hints at any facts which show that John Hoehner was acting under color of state law during the course of his representation. As a result, the Petition for Writ of Certiorari should be denied.

II.

THE FAILURE TO SHOW SPECIFIC ACTS BY JOHN HOEHNER DONE UNDER COLOR OF STATE LAW WITHIN THE PURVIEW OF SECTION 1983 DISPENSES WITH THE NECESSITY TO INQUIRE INTO ALLEGATIONS OF CONSTITUTIONAL DEPRIVATION UNDER THE SEVENTH AND FOURTEENTH AMENDMENTS.

The Washingtons spent a great majority of time in their Petition discussing what they perceived to be a deprivation of their rights, privileges and/or immunities guaranteed to them by the Constitution and the Indiana State Constitution. However, having failed to satisfy the requisite elements for establishing a cause of action under Section 1983 as stated in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908 (1981), there is no reason for the Respondent to address the question of any alleged deprivation of rights. Accordingly, the Petition for Writ of Certiorari should be denied.

CONCLUSION

For any and all of the aforegoing reasons, the Respondent respectfully moves this Court to deny the Petitioners' Writ of Certiorari.

Respectfully submitted,

STEVEN A. JOHNSON *
PAUL B. PORACKY
SPANGLER, JENNINGS, SPANGLER
& DOUGHERTY, P.C.
8396 Mississippi Street
Merrillville, Indiana 46410
(219) 769-2323

Attorneys for Respondent,
John F. Hoehner

* Counsel of Record

APPENDICES

	PAGE
A– United States Magistrate's Order, dated August 14, 1987	A-1
B– Letter from John F. Hoehner dated July 13, 1982 to Ava B. Washington	B-1
C– State Court Docket Sheet	C-1

APPENDIX A

[Filed August 14, 1987]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Civil No. S 83-125

CLYDE O. WASHINGTON and AVA B. WASHINGTON,
Plaintiffs,

v.

MARSHALL FIELD & CO., RICHARD P. SCHAUMANN, JOHN F. HOEHNER, THOMAS NAUGHTON, FIRST FEDERAL SAVINGS & LOAN, ORVILLE ANDERSON, JAMES PUGH, ELDON KRAUSCH, and CREDITORS SERVICE OF MICHIGAN CITY, INDIANA,
Defendants.

REPORT AND RECOMMENDATION

On May 7, 1987 the district court entered an order referring this case to the undersigned Magistrate to conduct hearings and submit proposed findings of fact and recommendations for the disposition of motions pursuant to § 636(b)(1)(B) of the Federal Magistrates Act. This report is submitted and filed with the court in conformity with § 636(b)(1)(C) of said Act.

Clyde and Ava Washington originally filed this lawsuit in the South Bend Division on March 24, 1983. Their *pro se* complaint alleges various acts of racial discrimination and civil rights violations by nine parties. On December 8, 1983 the Honorable Allen Sharp entered an order assigning this case to the Honorable William C. Lee.

The allegations contained in plaintiffs' complaint create three separate and distinct claims against various defendants. Plaintiffs' first claim involves the First Federal Savings and Loan Association of LaPorte County, Orville Anderson, and James Pugh. The complaint alleges that Anderson and Pugh committed conspiracy, racial discrimination and retaliation by withholding loan proceeds previously approved by First Federal in October of 1982. At the time in question, Anderson and Pugh were employed by First Federal as acting executive vice president and vice president/loan officer, respectively.

Plaintiffs' second claim involves John Hoehner. The complaint alleges that Hoehner committed conspiracy, malpractice and denied plaintiffs' their due process rights by not representing them in an action filed in LaPorte County Court by Marshall Field and Company and Creditors Service Bureau. Plaintiffs allege that Hoehner's action caused emotional trauma and resulted in a lien being placed against their property.

Plaintiffs' third claim involves Marshall Field and Company, Eldon Krausch, Tom Naughton, Richard Schaumann, and Creditors Service Bureau of Michigan City, Indiana. On February 2, 1980 Marshall Field and Company, as assignor, and Creditors Service Bureau, as assignee, filed suit against the Washingtons in LaPorte Superior Court to collect a past due charge account balance owed by Ava Washington. The Honorable Arthur Keppen entered judgment for Marshall Field and Creditors Service Bureau on June 12, 1980 for the sum of $2,735.14. Plaintiffs' complaint alleges that Marshall Field placed a lien against their personal and real property. In addition, plaintiffs allege that Richard Schaumann, an attorney retained by Creditors Service Bureau, committed perjury under oath during trial of the charge account matter in LaPorte County.

Numerous motions to dismiss and motions for summary judgment are presently before the court. At a pre-trial conference held on November 4, 1983 the Honorable Allen Sharp ordered all motions to dismiss converted to motions

for summary judgment. Chronologically, by date of filing, the pending motions are as follows.

On April 15, 1983 Marshall Field and Company and Richard Schaumann filed a motion to dismiss. Shortly thereafter, on April 28, 1983, Tom Naughton filed a motion to dismiss. John Hoehner filed a motion to dismiss and a motion for sanctions on November 4, 1983. On December 14, 1983 First Federal Savings and Loan Association, Orville Anderson and James Pugh filed a motion for summary judgment. John Hoehner renewed his motion to dismiss and motion for sanctions on October 29, 1986.

FINDINGS OF FACT

As indicated previously, the Washingtons' complaint contains three separate claims against the nine defendants. Accordingly, the undersigned will enter proposed findings of fact for each claim.

I. *Claim Against First Federal Savings and Loan Association of LaPorte County*

First Federal Savings and Loan Association of LaPorte County ("First Federal") is a federal savings and loan corporation licensed to conduct business in LaPorte County, Indiana. The Washingtons allegedly attempted to obtain a home improvement loan from First Federal between January 1977 and March 1981. Sometime in 1981 the Washingtons filed a complaint against First Federal with the Indiana Civil Rights Commission and the United States Department of Housing and Urban Development charging First Federal with unlawful discrimination in housing on the basis of race.

On October 19, 1981 the Washingtons and First Federal entered into a Consent Agreement. (See First Federal's Motion for Summary Judgment, Exhibit B). Under the terms of the Consent Agreement First Federal agreed to make a home equity loan to the Washingtons. Specifically, paragraph seven of the Consent Agreement provides

that First Federal would make an equity loan of 80% or 90% of the appraisal value of the Washingtons' home, minus the Washingtons' present mortgage, a second mortgage held by Avco Financial Company, escrow funds for a judgment against the Washingtons in LaPorte County Court, and the balance of the closing costs. Under the Consent Agreement the Washingtons agreed to waive their right to a formal determination of the complaint by the Indiana Civil Rights Commission.

On October 30, 1981 First Federal approved a loan in the amount of $32,600.00. (See First Federal's Motion for Summary Judgment, Exhibit D). After subtracting the items referred to in paragraph seven of the Consent Agreement and various expenses incurred in connection with the loan, the net balance payable to the Washingtons amount to $23,490.16.

The gravamen of the Washingtons' complaint is that First Federal violated the terms of the Consent Agreement by imposing a $19.56 closing fee solely for First Federal's protection. However, the Loan Settlement Statement signed by the Washingtons and First Federal on October 30, 1981 makes no reference to a $19.56 closing fee. The only $19.56 charge referred to on the Loan Settlement Statement is a $19.56 monthly mortgage insurance charge.

It appears to the undersigned that the Washingtons are attempting to characterize the mortgage insurance charge as a denial of the balance of the loan proceeds. However, in his affidavit James Pugh states that First Federal maintained a loan policy which required mortgage insurance from a borrower when the loan amount exceeded 80% of the appraised value of the real estate to be mortgaged. (See First Federal's Motion for Summary Judgment, Exhibit A, paragraph 6). According to Pugh, the loan given to the Washingtons on October 31, 1987 was 90% of the appraised value of their home (Exhibit A, paragraph 5). Consequently, the undersigned concludes that First Federal did not violate the Consent Agreement or deny the

balance of loan proceeds by imposing the $19.56 monthly mortgage insurance charge. First Federal imposed the charge pursuant to a validly existing loan policy.

II. *Claim Against John Hoehner*

The factual allegations underlying the Washingtons' cause of action against John Hoehner are contained in plaintiffs' Exhibit A through G filed on May 16, 1983. As plaintiffs' Exhibit C indicates, Ava Washington sent a letter to the Indiana State Bar Association concerning Mr. Hoehner on July 24, 1982. In this letter she alleges that Hoehner promised to represent her in a dispute with Marshall Field and Company regarding a closed charge account. In this letter Ava Washington asks for the return of a retainer fee she paid to Hoehner. In addition, she enclosed a copy of a letter she received from attorney Hoehner on July 13, 1982 advising her of his appointment as Assistant United States Attorney for the Northern District of Indiana. (See plaintiffs' Exhibit B). Mr. Hoehner's letter explained that he would no longer be engaged in private practice and would transfer the Washingtons' case to his brother, a Valparaiso attorney.

The Disciplinary Commission of the Supreme Court of Indiana responded to Ava Washington's letter on July 27, 1982. (See plaintiffs' Exhibit D). The Executive Secretary of the Commission, Sheldon Breskow, advised Ava Washington that fee matters between a client and his attorney are ordinarily not grounds for disciplinary action against the attorney. He also advised Ava Washington that she could file a complaint against attorney Hoehner on an enclosed grievance form.

On August 2, 1982 Ava Washington filed a formal complaint with the Disciplinary Commission against Mr. Hoehner. (See plaintiffs' Exhibit E). In her complaint she alleges that on December 23, 1981 she met with Hoehner at his Valparaiso office to discuss the Marshall Field mat-

ter.[1] During the course of this meeting Hoehner allegedly agreed to represent Mrs. Washington for $350.00. The complaint alleges that Mrs. Washington paid Hoehner $150.00 on December 23 and paid the balance the next day. In addition, the complaint alleges that Mrs. Washington sent a variety of documents to Hoehner pertaining to the Marshall Field matter.

The Disciplinary Committee subsequently dismissed the complaint against Hoehner. In a letter dated August 5, 1982 the Acting Executive Secretary of the Commission, Thomas Opsut, advised Mrs. Washington that her complaint did not "raise a substantial question of misconduct which would warrant disciplinary action against Mr. Hoehner." (See plaintiffs' Exhibit G).

III. *Claim Against Marshall Field*

Plaintiffs' claim against Marshall Field and Company, Creditors Service Bureau, Eldon Krausch, Tom Naughton, and Richard Schaumann centers on Ava Washington's charge account with Marshall Field and Company. Mrs. Washington opened her account in July 1972 and purchased various items in 1974 under a Home Plan Agreement. Marshall Field subsequently closed the account for being past due. On January 16, 1980 Marshall Field as-

[1] The LaPorte County Court entered judgment in favor of Marshall Field and Company and Creditors Service Bureau on June 12, 1980. Mrs. Washington did not consult attorney Hoehner until December 23, 1981. It is unclear why Mrs. Washington sought attorney Hoehner's assistance in the Marshall Field matter since the time for appealing the LaPorte County judgment had expired. Under Indiana law, the first step in perfecting an appeal is filing a Motion to Correct Error with the trial court. Indiana Trial Rule 59(c) provides that a Motion to Correct Error must be filed not later than 60 days after entry of a final judgment. Therefore, if the Washingtons intended to appeal the judgment, they would have had to file a Motion to Correct Errors no later than August 12, 1981.

signed the unpaid balance of the account to Creditors Service Bureau.

On February 5, 1980 Creditors Service Bureau, as assignee, and Marshall Field and Company, as assignor filed suit against the Washingtons in LaPorte County Court to collect the unpaid balance due on the account. *Creditors Service Bureau, Assignee, Marshall Field and Company, Assignor v. Clyde Washington and Ava Washington*, Cause No. LPC-MC-80—2P-340. At trial of the matter on June 12, 1980, Ava Washington argued that she made payments on her account and did not owe the $2,800.00 alleged in the complaint. Eldon Krausch, manager of Field's charge account department testified that Mrs. Washington owed $2,618.07 on one account and $167.07 on another account. The Honorable Arthur Keppen entered judgment against the Washingtons in the sum of $2,785.14. The Washingtons apparently did not appeal this judgment to the Indiana Court of Appeals.

CONCLUSIONS OF LAW

At the outset, the undersigned acknowledges the *pro se* nature of the Washingtons' complaint. *Pro se* pleadings are to be liberally construed. *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 592 (1972). The district court's role is to ensure that the claims of *pro se* litigants are given "fair and impartial consideration." *Matzker v. Herr*, 748 F.2d 1142, 1146 (7th Cir. 1984); *Caruth v. Pinkney*, 683 F.2d 1044, 1050 (7th Cir. 1982). The undersigned also recognizes that federal courts have historically exercised great tolerance to ensure that an impartial forum remains available to plaintiffs invoking the jurisdiction of the court without the guidance of trained counsel. *Pro se* motions and complaints such as the Washingtons' are held to less stringent pleadings requirements; rigor in the examination of such motions, complaints and pleadings is inappropriate.

Plaintiffs' original typewritten complaint is not a model of clarity. Aside from general allegations of racial discrimination and denial of due process, plaintiffs' complaint fails

to specify the particular civil rights statute under which plaintiffs' attempt to proceed. Having carefully reviewed the pleadings in this case, and liberally construing those pleadings, the undersigned interprets plaintiffs' complaint as attempting to state a cause of action under 42 U.S.C. § 1983. This conclusion is bolstered by the fact that the record in this case includes a filed but unstamped form entitled "Form To Be Used By Persons In Filing A Complaint Pro Se Under the Civil Rights Act, 42 U.S.C. § 1983."[2] After review of the record and the elements of § 1983 claims, it is the recommendation of the undersigned that all pending motions be granted and this cause be dismissed.

To establish a cause of action under § 1983[3] a plaintiff must allege, and subsequently prove, two essential elements. First, the plaintiff must allege that the defendant or defendants acted under color of state law. Second, the plaintiff must allege that the defendant or defendants deprived the plaintiff of a right, privilege, or immunity secured by the Constitution and laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1912

---

[2] It is unclear why this filed but unstamped form complaint is part of the court's record. Copies of the form complaint are attached to summons sent to Creditors Service Bureau, Eldon Krausch, James Pugh and Orville Anderson on December 22, 1983. In a notice dated December 20, 1983 the Clerk's office notified plaintiffs that service of process had not been accomplished to Krausch and Creditors Service Bureau. The December 22nd summons to these two defendants were apparently issued in response to this notice.

[3] Section 42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

(1981), *Matzker v. Herr*, 748 F.2d 1114, 1147 (7th Cir. 1984). Section 1983 generally does not address the conduct of private individuals. *Miller v. Duffin*, 637 F.Supp. 496, 502 (N.D. Ind. 1986). Since plaintiffs' complaint names private individuals and corporations as defendants, the critical injury in the present case is whether any of the defendants acted under color of state law. In light of the undersigned's conclusion that none of the defendants acted under color of state law, the question of whether plaintiffs' complaint alleges a constitutional deprivation need not be addressed. For the sake of clarity, the undersigned will examine the allegations as to each defendant.

I. *First Federal Savings and Loan Association of LaPorte County*

As indicated, First Federal is a federal savings and loan corporation. Federal savings and loan associations are chartered pursuant to the Home Owner's Loan Act, 12 U.S.C. § 1461 et seq., by the Federal Home Loan Bank Board, an agency of the United States. *Vazquez v. Bayamon Federal Savings and Loan Association*, 506 F.Supp. 113, 115 (D. Puerto Rico 1980). As a federal rather than a state entity, First Federal's actions do not constitute state action. Consequently, First Federal did not act under color of state law and plaintiffs' claim must necessarily fail.

Even assuming, arguendo, First Federal was a state savings and loan association, the requisite state action would not exist. Although banks must be subject to state regulation, this regulation does not convert the bank's actions into state action. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449 (1974); *Rynearson v. First Nat'l Bank of Rochester*, 602 F.Supp. 1253, 1256 (N.D. Ind. 1985). Moreover, a state's acquiescence in a particular banking practice does not convert that practice into action taken under color of state law. *Fletcher v. Rhode Island Hospital First Nat'l Bank*, 496 F.2d 927 (1st Cir.), *cert. denied*, 419 U.S. 1001, 95 S.Ct. at 320 (1974); *Rynear-*

son, 602 F.Supp. at 1257. Therefore, even if First Federal was a state entity, the actions of First Federal, Anderson and Pugh would not have been committed under color of state law.

II. *John Hoehner*

Hoehner allegedly agreed to represent the Washingtons in their dispute with Marshall Field concerning Ava Washington's charge account. The Washingtons allege that Hoehner denied them their due process rights by failing to represent them as agreed. They also allege that Hoehner committed malpractice and conspiracy. Although Mr. Hoehner is presently employed as an Assistant United States Attorney, he was a private attorney engaged in private practice when consulted by the Washingtons.

It is well established that representation of a client by an attorney is essentially a private function for which state office and authority are not needed and to which the requirement of acting under color of state law will not attach. *See, Polk County v. Dodson*, 454 U.S. 312, 319, 102 S.Ct. 445, 450 (1981). The licensing of lawyers as officers of a particular court does not cause lawyers to be considered to be acting under color of state law for purposes of § 1983 when a lawyer represents a party in legal proceedings. *Henderson v. Fisher*, 631 F.2d 1115 (3rd Cir. 1980); *Masel v. Industrial Commission of Illinois*, 541 F.Supp. 342 (N.D.Ill. 1982). *See also, Polk County*, 454 U.S. at 318-19, 102 S.Ct. at 450; *Ferri v. Ackerman*, 444 U.S. 193, 204, 100 S.Ct. 402, 209 (1979). An attorney representing a party in a legal proceeding, acting as that person's counsel, is not acting under color of state law within the meaning of § 1983. Such a conclusion is compelled by the character and nature of the service performed by the attorney. *Ferri*, 444 U.S. at 204, 100 S.Ct. at 409. *See also, Briscoe v. LaHoe*, 460 U.S. 325, 329, n. 6, 103 S.Ct. 1108, 1112, n. 6 (1983).

Plaintiffs' complaint, even if liberally construed, reveals nothing more than a personal dispute between an attorney

and his clients. Hoehner's actions were not taken under state law and, consequently, do not fall within the purview of § 1983. Further, allegations of malpractice by Hoehner are state law claims, not constitutional or federal claims. Although § 1983 is a tort remedy, it is a limited tort remedy. It addresses allegations of torts arising from violations of "rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Section 1983 is not meant to be duplicative of state tort law remedies. *See, Johnson v. Miller*, 680 F.2d 39 (7th Cir. 1982). The malpractice allegations contained in the Washingtons' complaint are fully actionable under state law. Those malpractice allegations are not actionable under § 1983. The undersigned therefore concludes that the requisite state action is not present and the Washingtons' claim against Hoehner must be dismissed.

Plaintiffs' original complaint also attempted to allege a conspiracy by Hoehner. The only conspiracy statute under which plaintiffs can proceed is 42 U.S.C. § 1985. In order to establish a conspiracy under § 1985, a plaintiff must "allege and prove four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the law; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States." *Grimes v. Smith*, 776 F.2d 1359, 1363 (7th Cir. 1985) *citing, United Brotherhood of Carpenters and Joiners of America, Local 610 v. Scott*, 103 S.Ct. 3352, 3356 (1983) *accord, Quiones v. Szorc*, 771 F.2d 289, 291 fn. 1 (7th Cir. 1985).

Aside from a conclusory allegation that John Hoehner "committed conspiracy" the Washingtons' complaint fails to present any facts which would support a finding of conspiracy. Consequently, the conclusory allegation of conspiracy must be dismissed. *Pfeil v. Rogers*, 757 F.2d 850 (7th Cir. 1985).

III. *Marshall Field and Company*

Plaintiffs' third claim involves Marshall Field and Company, Creditors Service Bureau, Eldon Krausch, Tom Naughton, and Richard Schaumann. Marshall Field and Creditors Service Bureau are private corporations. The remaining three defendants are private individuals.

As a general rule, private citizens and corporations do not act under color of state law and are thus not amenable to suit under § 1983. Section 1983 "does not create a remedy for all conduct that may result in violation of 'rights, privileges, or immunities secured by the Constitution and laws.' " *Briscoe v. LaHue*, 103 S.Ct. 1108, 1112 (1983). It was enacted pursuant to the authority of Congress to enforce the fourteenth amendment, *Rendell-Baker v. Kohn*, 102 S.Ct. 2764, 2770 (1982), and the fourteenth amendment applies to acts done by the state, and not those done by private parties or entities. *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18 (1883).

A private defendant acts under color of state law only if he engages in a conspiracy with state officials or is a willful participant in a joint activity with the state. *Adicke v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90 S.Ct. 1598, 1605 (1970); *Malak v. Associated Physicians, Inc.*, 784 F.2d 277, 281 (7th Cir. 1986). Plaintiffs' complaint contains no allegations, nor facts which could infer any allegations, of a conspiracy with the state to deny plaintiffs' constitutional rights. Therefore, it is the opinion of the undersigned magistrate that plaintiffs' complaint fails to establish the essential element of state action and should be dismissed.

In addition, the undersigned agrees with defendants' contention that the present action is nothing more than a collateral attack on the judgment entered against the Washingtons in LaPorte County Court. The mere fact that the defendants utilized the state court system to obtain a judgment against the Washingtons does not constitute state action for purposes of § 1983. The filing or pros-

ecution of an action in state court under color of state law does not cause the private person filing the action to be considered to be acting under color of state law within the meaning of § 1983. *Grow v. Fisher*, 523 F.2d 875, 879 (7th Cir. 1975). Moreover, merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint action with the state. *Dennis v. Sparks*, 449 U.S. 24, 28, 101 S.Ct. 183, 186 (1980).

Even when plaintiffs' complaint is liberally construed it is clear that none of the defendants in the Marshall Field claim are state actors. The defendants' decision to pursue the Washingtons in state court to recover the unpaid charge account balance does not constitute action taken under color of state law and does not give rise to a cognizable § 1983 claim.

CONCLUSION AND RECOMMENDATION

On the basis of the foregoing, it is the conclusion and recommendation of the undersigned United States Magistrate that all pending motions to dismiss and motions for summary judgment be GRANTED and plaintiffs' complaint be DISMISSED.

Pursuant to § 636(b)(1)(C) of the Federal Magistrate Act, the parties have ten (10) days from service of this Report and Recommendation to file written objections to the proposed findings and recommendations with the district court.

Dated this 14th day of August, 1987.

/s/ GENE B. LEE
Gene B. Lee,
United States Magistrate

Copies to:

Clyde O. Washington
Ava B. Washington
342 Crestwood Drive
P.O. Box 8834
Michigan City, Indiana 46360

C.T. Kitowski
Attorney At Law
720 Franklin Square
Michigan City, Indiana 46360

Spangler, Jennings, Spangler & Dougherty, P.C.
Attorneys At Law
8396 Mississippi Street
Merrillville, Indiana 46410
Attention: David J. Hanson

Richard P. Schaumann
Attorney At Law
3021 E. Michigan Boulevard
P.O. Box 386
Michigan City, Indiana 46360

Eldon Krausch
c/o Marshall Field and Company
111 North State Street
Chicago, Illinois 60690

Creditors Service of Michigan City, Indiana
3021 East Michigan Boulevard
Michigan City, Indiana 46360

APPENDIX B

(Letterhead Of)

John F. Hoehner
Attorneys at Law
3 Lincolnway
Valparaiso, Indiana 46383

July 13, 1982

Ms. Ava Washington
342 Crestwood Drive
Michigan City, IN 46360

Dear Ms. Washington:

The purpose of this letter is to inform you that I have been appointed Assistant United States Attorney for the Northern District of Indiana and that, therefore, effective July 23, 1982, I will no longer be engaged in the private practice of law.

I would like to transfer your file to my brother, William L. Hoehner, who is currently practicing law in the State of Indiana and who will, for the most part, assume the bulk of my practice. I am certain that Bill will do an excellent job in respect to your concerns and I have fully briefed him reference the status of your case. Indeed, your file has been given to Bill and he currently maintains it at his office located at 63 Franklin Street, Valparaiso, Indiana, 46383.

Of course, you are liberty to take your file to any attorney with whom you might feel more comfortable. In the event transferring your file to my brother is not satisfactory to you, please call him at 219/462-4151 to make convenient arrangements for the release of your file. In the event you do desire to retain Bill as your attorney, please feel

free to call him at any time with any question you may have reference your file.

In closing, please allow me to thank you for the opportunity to render legal services to you. I consider it a privilege to have served you.

Sincerely yours,

/s/ JOHN F. HOEHNER
John F. Hoehner

JFH/ms

APPENDIX C

PLENARY COURT DOCKET,
LAPORTE COUNTY COURT – M.C.

Charge Purchased Goods *Filed* 2-5-80

No. LPC-MC-80-2P-340

Attorneys	Parties
Schaumann & Fenton	Creditors Service Bureau, Assignee Marshall Field & Company, Assignor vs Clyde & Ava Washington

Date	Minutes of Court
2-5-80	Complaint filed in Clerk's office, plenary division. $32.00 filing fee paid. Plaintiff asks judgment for $2,800.14 and costs. Summons issued, to LaPorte County
5-21-80	Def files Answer. Trial set for June 12, 1980 at 10:30 A.M.
6-12-80	Plaintiff in court by Atty Schaumann. Defendant appeared in person. Trial. Witnesses sworn. Evidence had. Finding for Plaintiff in sum of $2785.14 Judgment against defendant in sum of $2785.14 and costs in sum of $32.00
8-7-80	Pd $3.00 Proc Supp in 26993
8-7-80	Comes now plaintiff by counsel and files verified motion for proceedings supplemental to execution. Motion examined and approved. Court now orders defendant to appear in open court on the 27th day of August, 1980 10:30 A.M.

Date	Minutes of Court
10-3-81	Plaintiff files verified motion for proceedings supplemental to execution. Hearing set for the 30 day of December, 1981, at 10:30 a.m.
12-10-81	Mailed proc. supp.
7-1-82	Plaintiff files verified motion on Proceedings supplemental. Hearing on plaintiff's motion set for the 11 day of August, 1982, at 10:30 a.m.
8-11-82	Continued to September 15, 1982 at 10:30 A.M.
9-15-82	Def fails to appear.